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**Citizenship:  
Contrasting Dynamics at the Interface of  
Integration and Constitutionalism**

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**Abstract**

This paper explores the different ways in which citizenship has played a role in polity formation in the context of the European Union. It focuses on both the 'integration' and the 'constitution' dimensions. The paper thus has two substantive sections. The first addresses the role of citizenship of the Union, examining the dynamic relationship between this concept, the role of the Court of Justice, and the free movement dynamic of EU law. The second turns to citizenship in the Union, looking at some recent political developments under which concepts of citizenship, and democratic membership as a key dimension of citizenship, have been given greater prominence. One key finding of the paper is that there is a tension between citizenship of the Union, as part of the EU's 'old' incremental constitutionalism based on the constitutionalisation of the existing Treaties, and citizenship in the Union, where the possibilities of a 'new' constitutionalism based on renewed constitutional documents have yet to be fully realised.

**Keywords**

Citizenship, European Union, Treaty of Lisbon, Free Movement, Constitution

# Citizenship: contrasting dynamics at the interface of integration and constitutionalism<sup>1</sup>

## A. Introduction

This chapter explores the different ways in which citizenship, both as a resonant political ideal and as a legal status attached to individuals, has played a role in polity formation beyond the state, specifically in relation to the EU as an emergent non-state polity. It explores two dimensions of citizenship as it operates in the Union context. The first concerns the role of ‘citizenship of the Union’ as a legal status, viewed in relation to the function of EU law as a framework for integration based on Treaties agreed between the Member States, but endowed with institutions which operate autonomously—in particular a Court of Justice. Studying this dimension of citizenship in the EU context has traditionally implied a primary focus on the transnational character of most Union citizenship rights as enumerated in the Treaties and interpreted by the Court of Justice. However, as we shall see—as in other fields of EU law—the Court of Justice is now tentatively exploring the terrain of citizenship beyond or, perhaps better, outwith the immediate confines of the single market, deploying the symbolic capital of citizenship related arguments in ways which seem more and more remote from the immediate practices of the single market. The second dimension of citizenship under the microscope concerns the actual and potential role of citizenship *in* (not *of*) the Union as a polity. Can citizenship in this context be about more than individual rights (and duties?), and can it acquire a distinct political dimension appropriate to a polity which is evolving beyond the state, albeit not without reference to the legal and political frameworks of the states which comprise its constituent members. This is the task of identifying the putative constitutional character of citizenship in the European Union. Section B explains in more detail the approach adopted by the chapter, and Sections C and D explore those two dimensions with a view, in particular, to understanding the relationship between them. As these sections will show, the dual character of the Union’s constitutional nature makes it harder to develop a secure understanding of how citizenship fits into the framework of the Union.

Before moving on, however, a word of introduction is needed to delimit the scope of this chapter in order to put the argument into its proper context. It is important to draw a distinction between the study of citizenship in the context of a state and its study in the context of the European Union. Citizenship *of* the Union, as introduced by the Treaty of Maastricht in 1993, has often been mocked as a form of ‘citizenship-lite’, or as a purely symbolic status, redolent of rights without identity, and of access without belonging.<sup>2</sup> When the Court of Justice asserted in *Grzelczyk* that citizenship of the Union was ‘destined to be the fundamental status of the nationals of the Member States’,<sup>3</sup> it was outlining an aspiration and not claiming that this was presently the case. It is also a rather confusing statement, given that—as a *status*—citizenship of the Union is dependent upon the differing approaches to

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<sup>1</sup> I am grateful to Niamh Nic Shuibhne for her comments on an earlier draft of this chapter.

<sup>2</sup> W Maas, ‘Unrespected, unequal, hollow? Contingent citizenship and reversible rights in the European Union’, (2009) 15 *Columbia Journal of European Law* 265-280.

<sup>3</sup> Case C-184/99 *Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-La-Neuve* [2001] ECR-I 6193 [31].

citizenship definition of the Member States,<sup>4</sup> as only the nationals of the Member States are citizens of the Union (Article 20(1) TFEU). Whether it becomes the fundamental basis on which such persons hold *rights* is another matter entirely. Presently the list of rights ascribed to *mobile* EU citizens under the Treaties themselves is rather limited and the impact of EU citizenship on nationals of the Member States who do not exercise their free movement rights is even less clear. It could be argued that the Court itself acknowledges that point because it went on in *Grzelczyk* to say that Union citizenship enables ‘those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for’.<sup>5</sup> In other words, at that point the Court was expressly recognising that the legal basis of Union citizenship was primarily its operation as an equal treatment rule. This has been evident since its initial case law on the interpretation of Union citizenship in the late 1990s, and on that view the case law since that time has largely been focused on finding the limits to that equal treatment principle, with the Court of Justice not always being entirely consistent in its approach.<sup>6</sup> The same type of non-discrimination approach remains in large measure the defining characteristic of most EU citizenship case law into the second decade of the twenty first century, although—as we shall see below—the Court has taken some initial steps towards asserting in a more pro-active way just how EU citizenship could be reconstructed such as to constrain to a greater degree the scope and boundaries of national citizenship and thus of national sovereignty in this area.

It is clear that the concept of citizenship as it operates in relation to a state still remains a much more rounded creature than citizenship of the Union. Subject to the strictures of international law<sup>7</sup> and EU law,<sup>8</sup> states act as their own gatekeepers in terms of determining the body of the citizenry, and should respect the sovereign acts of other states. Moreover, at the national level, citizenship is invested with an intensity of political significance and substance, and a connection to the body politic in the broadest sense. The same cannot be said in the case of the EU, at least at the present time. For example, the EU’s ‘own’ elections (i.e. elections of members of the European Parliament) tend to be fought on the basis of national political platforms by national political parties fielding national candidates, despite the existence of electoral rights for EU citizens under Articles 22(2)(b) and 23 TFEU allowing them to vote on the basis of residence rather than citizenship. Thus in practice, most of the legal regulations governing European Parliament elections are national, not European in character.<sup>9</sup> Equally, of course, it should be recognised that European Parliament elections take place on an entirely different scale to national elections in the Member States, and in the context of a different ‘type’ of polity. This immediately gives rise to caution about the types of expectations which should be invested in a citizenship concept operating at the EU level, and about the extent and manner in which it might reasonably be expected to differ from citizenship at the Member State level.

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<sup>4</sup> For details on this question, see the country profile sections of the EUDO-Citizenship Observatory: [www.eudo-citizenship.eu](http://www.eudo-citizenship.eu). See further D Kochenov, ‘*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights’, (2009) 15 *Columbia Journal of European Law* 169-237.

<sup>5</sup> *Grzelczyk* [31].

<sup>6</sup> See for example the analysis of S O’Leary, ‘Equal treatment and EU citizens: a new chapter on cross-border educational mobility and access to student financial assistance’, (2009) 34 *European Law Review* 612-627.

<sup>7</sup> *Liechtenstein v Guatemala (Nottebohm)* 1955 ICJ 4.

<sup>8</sup> Case C-369/90 *Micheletti v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239, Case C-135/08 *Rottmann v Freistaat Bayern*, judgment of 2 March 2010.

<sup>9</sup> This point was recognised by the Court of Justice in Case C-145/04 *Spain v. United Kingdom* [2006] ECR I-07917.

Even so, to adopt a phrase coined by Niamh Nic Shuibhne, the EU appears to be a ‘citizenship-capable polity’, from a normative perspective.<sup>10</sup> That is, it is a polity which displays the types of constitutional features where one might also expect to find some sort of concept of membership in operation as a means of distinguishing between groups of included and excluded persons, as well as rules setting out the boundaries and contents of rights and duties. Thus it is a polity based on a constitutional framework underpinned by the rule of law, respect for fundamental rights and principles of accountability, including (limited) electoral accountability, but also accountability through judicial review and a variety of other mechanisms, such as the right to complain to the Ombudsman, to petition the European Parliament and to seek access to documents. We should expect therefore to find some evidence of citizenship-related practices *in* the context of the EU’s development as a polity. ‘Citizenship-capability’ thus seems a reasonable intuition with which to begin the discussion, although no one could deny that there are many challenges to such a notion, not least because both the process and structures of European integration remain highly contested and because the idea of the EU undertaking ‘citizenship-type’ tasks and activities struggles to attain a legitimate status in the eyes of many citizens of the Member States. Historically top-down structures of output-based legitimation have not, thus far, effectively been replaced by bottom-up citizen-driven input-based legitimation.<sup>11</sup> It is hard, for example, to imagine the EU in its present stage of development acquiring the ‘duties’ dimension of the citizenship concept, given the limitations upon its legal competences, as well as limited recognition of its political capacity, e.g. in the external sphere. Hence even with such soft intuitions, caution should be exercised. All in all, if a good working definition of citizenship combines elements of rights, access and belonging,<sup>12</sup> then the value-added of citizenship at the EU level is strongest in relation to the rights to which it gives rise, but much weaker in relation to questions of access and belonging (including duties). One task of this chapter will be to consider to what extent this is changing, and if so, in what ways and with what consequences.

## **B. Key Questions in (EU) Citizenship Studies**

The key to understanding citizenship’s role within the European Union is to avoid thinking about Union citizenship and citizenship of the Member States as two separate and unrelated phenomena, even though they are different in character. The two concepts are not linked just because one (national citizenship) gives access to the other (Union citizenship), or because the Treaties formally reinforce their complementary character. On the contrary, the complex relationship between the two can only be effectively understood by deploying a composite and multi-faceted concept of citizenship which links together the different levels and different spheres in which individuals claim citizenship rights, carry out citizenship duties and act out citizenship practices. In other words, we should focus on citizenship *in* the EU context, not specifically and solely on citizenship *of* the Union. For those who live in complex polities which exhibit shifting and evolving vertical and horizontal relationships between different levels and spheres of political authority, citizenship itself is best understood multi-perspectively. The concept of citizenship operating in Europe today is both multilevel

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<sup>10</sup> See N Nic Shuibhne, ‘The Outer Limits of EU Citizenship; Displacing Economic Free Movement Rights?’, in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law*, Oxford, Hart Publishing, 2009, 167-195 at 168; the idea is discussed in more detail in N Nic Shuibhne, ‘The resilience of market citizenship’, forthcoming 2010.

<sup>11</sup> JHH Weiler, *The Constitution of Europe*, Cambridge, Cambridge University Press, 1999, at 83.

<sup>12</sup> See A Wiener, *From Special to Specialized Rights: The Politics of Citizenship and Identity in the European Union*, in M Hanagan and C Tilly (eds.), *Extending Citizenship, Reconfiguring States*, Lanham, etc.: Rowman and Littlefield, 1999 at 200-201.

and composite in character. It comprises a range of different legal statuses at the international, supranational, national and subnational level<sup>13</sup>—as well as at the level of individual and group identity—with various normative systems cutting across each other and, from time to time, coming into conflict. In important respects, however, these different elements are mutually constitutive. Samantha Besson and André Utzinger<sup>14</sup> explain the evolution of a composite ‘European’ citizenship in an interesting way. They argue that changes have not occurred

‘by supplanting national citizenships and replacing them with an overarching supranational citizenship of the Union... Rather, citizenship remains strongly anchored at the national level in Europe albeit in a different way. The change is both quantitative and qualitative. First, citizenship in Europe has become multi-levelled as European citizens are members of different polities both horizontally across Europe (other Member States) and vertically (European transnational, international and supranational institutions). Second, national citizenship in and of itself has changed in quality and has been made more inclusive in its scope and mode of functioning. Union citizenship adds a European dimension to each national *demos* and, to a certain extent, alters national citizenship in reconceiving it in a complementary relation to other Member States’ citizenships.’

Their argument reinforces the point that engaging in citizenship practices in the context of the Euro-polity—i.e. in relation to the EU and its Member States viewed as a composite and conjoined polity—does not involve a zero-sum game. Indeed, as has been articulated in the EU Treaties since the Treaty of Amsterdam, Union citizenship and national citizenship are complementary in character and the former, in particular, is not supposed to supplant or replace the latter, but rather be additional to it (Article 20(1) TFEU). A similar approach is suggested by Christoph Schönberger, who argues in favour of thinking about citizenship in the Union from a federal perspective, which means we must ‘free ourselves from the unitary state-centred categories and consider the possibility of *tiered, nested citizenships in federal systems*.’<sup>15</sup> Approaching the issue from the point of view of international law, the approach here shares much in common with the dual track approach to democratic legitimation within the context of the constitutionalisation of international law, adopted by Anne Peters in her joint work with Jan Klabbers and Geir Ulfstein.<sup>16</sup> As Peters argues, a democratised world order depends for its legitimacy both upon democracy *within* states and within *international institutions and processes*.

Against that backdrop, this chapter seeks answers to four central questions about the role of these composite concepts of citizenship in the evolution of the Union as a polity:

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<sup>13</sup> This issue is not explored further in this chapter, but see, for examples of subnational citizenship practices, the contestations with federal and quasi-federal states in particular on questions of the definition of the *demos*: J Shaw, ‘Political Rights and Multilevel Citizenship in Europe’, in E Guild, K Groenendijk and S Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Farnham, Ashgate, 2009, 29-49.

<sup>14</sup> S Besson and A Utzinger, ‘Towards European Citizenship’, (2008) *The Journal of Social Philosophy* 185 at 196; see also L Besselink, Case Notes on *Gibraltar, Aruba, and Sevinger and Eman v The Netherlands*, (2008) 45 *Common Market Law Review* 787-813, at p801, arguing that the composite constitutional arrangement underpinning the Euro-polity is not a ‘monolithic European concept of citizenship’.

<sup>15</sup> Emphasis in the original. C. Schönberger, ‘European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism’, (2007) 19 *Revue Européenne de Droit Public* 61-81, 61.

<sup>16</sup> See J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law*, Oxford: Oxford University Press, 2009, Chapter 6.

1. At the highest level of generality, what role has citizenship played in the ‘constitutionalisation’ of the European Union and thus in the process of polity-formation beyond the state?
2. How has the concept of citizenship—specifically the concept of citizenship of the Union, but also more generally the idea of the Union being ‘citizenship-capable’—been used within and/or affected by the evolution of the law/integration/disintegration narrative? What difference has citizenship made to the evolution of the law governing free movement and the principle of non-discrimination which together underpin the (market) integration project of the EU? Or has, in fact, citizenship been thus far primarily parasitic upon the symbolic capital engendered by free movement?
3. What more, if anything, is there to citizenship of the Union outwith the integration or market citizenship dynamic, specifically in the context of the role of citizens in the democratic legitimisation of policies and institutions?
4. Drawing a distinction between ‘old’ constitutionalism (the ‘constitutionalisation’ of the Treaties) and ‘new’ constitutionalism (the search for a ‘refounding’ of the Union on the basis of a single ‘constitutional’ text), can we discern any differences in how the concepts of citizenship *of* and *in* the Union have been understood and used by the key actors in the processes of legal and institutional change?

The aim is to complement existing literatures which have adopted other related ‘evolutionary’ perspectives upon citizenship questions. There have already been numerous descriptive and analytical surveys of the evolution and entrenchment of a concept of citizenship into the political and legal framework of the European Union, starting from the inception of the EEC Treaty and focusing on the roles of the European Parliament, the European Commission, the Court of Justice and latterly the Member States at the intergovernmental conferences which led to the Treaty of Maastricht. There has been work which has made use of both politico-legal<sup>17</sup> and political science/international relations perspectives,<sup>18</sup> as well as more recent attempts to explain the subsequent evolution of the Court of Justice’s case law.<sup>19</sup> More adventurous work has addressed these questions via the dynamics of institutional change using various tools drawn from political science,<sup>20</sup> or on the basis of rights theories of legal philosophers such as Ronald Dworkin and Robert Alexy.<sup>21</sup> The precise character of Union citizenship has come under scrutiny from multiple angles including normative political philosophy,<sup>22</sup> political science,<sup>23</sup> political sociology,<sup>24</sup> as well as the obvious reference point

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<sup>17</sup> J Shaw, ‘Citizenship of the Union: Towards Post-national Membership?’, in Academy of European Law (ed), *Collected Courses of the Academy of European Law*, vol VI, Book 1, The Hague: Kluwer Law International, 1998, 237-347; J Shaw, ‘The Interpretation of European Union Citizenship’, (1998) 61 *Modern Law Review* 293-337; M Elmore and P Starup, ‘Union Citizenship – Background, Jurisprudence, and Perspective: the Past, Present, and Future of Law and Policy’, (2007) 26 *Yearbook of European Law* 57-113.

<sup>18</sup> A Wiener, ‘European’ *Citizenship Practice. Building Institutions of a Non-State*, Boulder, Col: Westview Press, 1998; W Maas, *Creating European Citizens*, Lanham, etc.: Rowman and Littlefield, 2007; W Maas, ‘The Genesis of European Rights’, (2005) 43 *Journal of Common Market Studies* 1009-1025; E Olsen, ‘The origins of European citizenship in the first two decades of European integration’, (2008) 15 *Journal of European Public Policy* 40-57.

<sup>19</sup> Especially by current and former members of the Court of Justice: e.g. F Jacobs, ‘Citizenship of the European Union—A Legal Analysis’, (2007) 13 *European Law Journal* 591-613; J Kokott, *EU citizenship - citoyens sans frontières?*, Annual Lecture of the Durham European Law Institute, 2005.

<sup>20</sup> D Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’, (2005) 68 *Modern Law Review* 233-267.

<sup>21</sup> Y Borgmann-Prebil, ‘The Rule of Reason in European Citizenship’, (2008) 14 *European Law Journal* 328-350.

<sup>22</sup> R Bellamy, ‘Evaluating Union citizenship: belonging, rights and participation within the EU’, (2008) 12 *Citizenship Studies* 597-611; R Bellamy, ‘The ‘Right to Have Rights’: Citizenship Practice and the Political



of legal scholarship.<sup>25</sup> From time to time, the specific relationship between citizenship of the Union and the citizenship laws of the Member States has been closely examined, with sharply differing conclusions amongst scholars as to the residual significance of national citizenship law in an era of Europeanisation and, indeed, globalisation.<sup>26</sup> Finally, in my own work, I focused on exploring in detail the developmental character of citizenship as currently constituted in the EU through a case study of the electoral rights guaranteed under the EU Treaties.<sup>27</sup>

Rather than simply add to this substantial corpus of material, the approach chosen here is a little different. It will, inevitably, cover some of the same ground, and indeed it must do so, because it remains important to chart both the emergence of a concept of citizenship and its instantiation in the Treaties, legislative measures and case law as well as in certain broader social and political practices which constitute ‘European’ politics, so far as it exists. This is a story which ‘can be seen as a microcosm of some of the key variables at play within the story of EU integration more generally’.<sup>28</sup> But this ground will be covered with a specific purpose in mind, which is to show that there are two distinct and quite different discourses on citizenship operating within the framework of the European Union, and that there is—perhaps surprisingly—relatively little interaction between the two. On the one hand, we can see that in relation to the principles of free movement and non-discrimination which represent the central pillars of the EU’s single market and legal integration project, citizenship has become—since the late 1990s—an important factor in legal and policy development. The ‘legacy of market citizenship’,<sup>29</sup> predicted by Michele Everson in the early 1990s, has proved to be even more durable than might have been expected, and in many respects it has been the activism of the Court of Justice which has contributed to this. In comparison, in relation to the further development of treaty-based reform since the heady days of the early 1990s when the Member States first appeared to subscribe to the Commission’s much vaunted manifesto of creating ‘special rights’ for Union citizens,<sup>30</sup> there have been noticeably fewer changes and a general failure to harness the resonance of citizenship as a political and legal concept. This means that the citizen, as political actor in the context of the evolution of the Union as a polity, remains underdeveloped and unrecognised—despite numerous attempts to promote

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Constitution of the EU’, in R Bellamy and A Warleigh (eds), *Citizenship and Governance in the European Union*, London: Continuum, 2001, 41-70; R Bauböck, ‘Why European Citizenship? Normative Approaches to Supranational Union’, (2007) 8 *Theoretical Inquiries in Law* 452-488; D Kostakopoulou, ‘European Union Citizenship: Writing the Future’, (2007) 13 *European Law Journal* 623-646; Besson and Utzinger, (above n.14).

<sup>23</sup> W Maas, ‘Migrants, states, and EU citizenship’s unfulfilled promise’, (2008) 12 *Citizenship Studies* 583-596; K Eder and B Giesen (ed), *European Citizenship. National Legacies and Transnational Projects*, Oxford: Oxford University press, 2001.

<sup>24</sup> G Delanty, ‘European Citizenship: A Critical Reassessment’, (2007) 11 *Citizenship Studies* 63.

<sup>25</sup> M Elsmore and P Starup, ‘Union Citizenship – Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy’, (2007) 26 *Yearbook of European Law* 57-113.

<sup>26</sup> C Closa, ‘Citizenship of the Union and Nationality of the Member States’, (1995) 32 *Common Market Law Review* 487-518; G-R de Groot, ‘Towards a European Nationality Law’, *Electronic Journal of Comparative Law*, vol 8.3 (October 2004), <http://www.ejcl.org/>; D Kochenov, *Rounding up the Circle: The Mutation of Member States’ Nationalities under Pressure from EU Citizenship*, EUDO-Citizenship Working Paper, 2010, forthcoming, [www.eudo-citizenship.eu](http://www.eudo-citizenship.eu); G Davies, ‘“Any Place I Hang My Hat?” or: Residence is the New Nationality’, (2005) 11 *European Law Journal* 43-56.

<sup>27</sup> J Shaw, *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of Political Space*, Cambridge: Cambridge University Press, 2007.

<sup>28</sup> Shaw, (above n27) at 93.

<sup>29</sup> M Everson, ‘The Legacy of the Market Citizen’, in J Shaw and G More (eds), *New Legal Dynamics of European Union*, Oxford, Oxford University Press, 1995, 73-90.

<sup>30</sup> See Wiener, (above n18), especially Chapters 5 and 8.

‘citizenship’, notably by purporting to engage with citizens’ expectations. This phenomenon, and the reasons for it, will be explored in full in Section D.

There is, of course, a well worn argument that the Court of Justice has been and remains the main engine of European integration. This argument retains some traction even today, not least for the purposes of offsetting the continuing widespread ignorance about what the Court of Justice does, which is still to be found amongst many scholars of European integration; but it is an argument that must in truth be treated with caution as it would tend to ‘overstate the integrative capacity of law and posit a view of the case law as progressing ineluctably to a particular constitutional *finalité*.’<sup>31</sup> More precisely, the point of the comparison here is to draw attention to the contrast between how the powerful notion of citizenship is regularly used in a symbolic manner by the Court of Justice, sometimes in conjunction with human rights arguments,<sup>32</sup> in order to justify some of its most daring judgments on free movement and single market questions since the end of the 1990s onwards, and the more sporadic and less effective invocation of citizenship questions in political debates about EU constitutionalism. Moreover, that relationship is symbiotic, as the Court has also used the ‘power’ of free movement rhetoric in order to build up the concept of citizenship of the Union, given that it is defined in rather ‘thin’ terms in the Treaties. Indeed, since the grandiose ‘establishment’ of Union citizenship in the Treaty structure through the Treaty of Maastricht, there have been few institutional developments of note aimed at reconstructing the position of the individual citizen as a political subject, as opposed to invoking the collective name of ‘citizens’, as the basis for a claim to be constructing ‘a Europe for its citizens’, which is ‘close to its citizens’.<sup>33</sup> The ineffectiveness of the political rhetoric and action in this field has not, of course, silenced other voices, especially those of scholars, who have picked up on the inevitable centrality of concepts of citizenship in the context of polity-building,<sup>34</sup> but much of the academic debate has stalled around the fundamental *demos/no demos* debate. For some,<sup>35</sup> debating European citizenship is a futile exercise, as there cannot be a European people for there European state, and thus in the absence of a common identity based on a ‘story of peoplehood’,<sup>36</sup> there cannot be a ‘European’ citizenship. Such a notion could only ever be artifice. For others, the *telos* of European integration demands a strong concept of citizenship and although it is acknowledged that at present it is in a state of becoming, rather than the finished article, its construction none the less remains the central

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<sup>31</sup> See J Hunt and J Shaw, ‘Fairy Tale of Luxembourg? Reflections on law and Legal Scholarship in European Integration’, in D Phinnemore and A Warleigh-Lack (eds), *Reflections on European Integration. 50 Years of the Treaty of Rome*, Basingstoke: Palgrave Macmillan, 2009, 93-108 at 111.

<sup>32</sup> This has been particularly visible in cases where there is a family reunion element involved, where the Court has often been ready to invoke Article 8 ECHR to support its arguments. See for example Case C-200/02 *Chen v. Secretary of State for the Home Department* [2004] ECR I-9925 and Case C-127/08 *Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-06241.

<sup>33</sup> The best example of such rhetoric is the Laeken Declaration, Presidency Conclusions of the European Council meeting of 14 and 15 December 2001, available on the European Convention website at <http://european-convention.eu.int/pdf/LKNEN.pdf>.

<sup>34</sup> N Walker, ‘Denizenship and Deterritorialisation in the European Union’, in H Lindahl (ed), *A Right to Inclusion and Exclusion*, (Oxford, Hart Publishing, 2009), 261-272.

<sup>35</sup> See, most recently, a return to the *demos/no demos* arguments under the shadow of the German Federal Constitutional Court’s decision on the constitutionality of the Treaty of Lisbon: D Grimm, ‘Comments on the German Constitutional Court’s Decision on the Lisbon Treaty. Defending Sovereign Statehood against Transforming the European Union into a State’, (2010) 5 *European Constitutional Law Review* 353-373.

<sup>36</sup> R Smith, *Stories of Peoplehood. The Politics and Morals of Political Membership*, Cambridge: Cambridge University Press, 2003.

normative challenge for the Union, the Member States and political elites.<sup>37</sup> A ‘middle way’ focuses on the articulation of the EU as a ‘demoi-cracy’, not a democracy, where it is the interplay between the still largely national spheres of democratic practice, rather than the attempt to create a single holistic democratic sphere at the EU level, which is the central normative challenge.<sup>38</sup> In that sense, the debate in the EU context has reflected in certain respects a broader debate about whether citizenship at the *state* level is withering away in the face of the effects of globalisation and the widespread invocation of international law as the root of many human rights claims. Citizenship, on this reading, is transformed into a multivalent form of postnational membership.<sup>39</sup> In the view of some scholars, the different practices of the EU institutions (judicial, legislative, executive) are capable of being subsumed under a single normative and indeed postnational argument about the fundamental character of EU citizenship.<sup>40</sup>

This chapter does not seek to add further enlightenment to these important scholarly and political debates, but rather it is an attempt to identify and analyse relevant institutional practices which incrementally constitute the Union’s emergence as a polity which is more than simply an international organisation grounded on treaties between sovereign states. The focus here is on how citizenship concepts have been used in legal and constitutional contexts and on the contestations and debates which have occurred around such use. The aim is to draw out some of the patterns and exchanges between key actors, with a view to understanding how these key ideas have developed. If there is a political conclusion to be drawn, then it is this: citizenship still has an uncertain ‘constitutional’ role in the European Union and this can be attributed at least in part to the uneasy shift which has occurred between ‘old’ and ‘incremental’ versions of European constitutionalism based on the classic law/integration interface and the ‘newer’ more formalised ones, epitomised by the grand and ultimately misplaced ‘dreams’ of a ‘Constitution for Europe’s citizens’ trailed in the Laeken Declaration of December 2001. This was a dream which went on to dominate the Convention on the Future of Europe and indeed filtered into the intergovernmental conference which finalised the draft produced by the Convention into a formal treaty text,<sup>41</sup> until it turned to nightmare with the negative referendums on the Treaty establishing a Constitution for Europe in France and the Netherlands in spring 2005. At that moment, it became clear that whatever Europe’s citizens expected of the Union, it was not reasonable for elites to expect citizens to offer an easy acceptance of a ready-made ‘European constitution’, perceived as having been imposed with minimum consultation and little democratic legitimacy.

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<sup>37</sup> M Aziz, ‘Implementation as the Test Case of Union Citizenship’, (2009) 15 *Columbia Journal of European Law* 281-298.

<sup>38</sup> S Besson, ‘Deliberative demoi-cracy in the European Union: Towards the Deterritorialization of Democracy’, in S Besson and JL Marti (eds), *Deliberative Democracy and its Discontents: National and Post-National Challenges*, Aldershot, Ashgate, 2006, 181-214; K Nicolaïdes, ‘We, the Peoples of Europe ...’, (2004) 83 *Foreign Affairs* 97-110; Besson and Utzinger, (above n14).

<sup>39</sup> For a somewhat partial review of the debates see R Hansen, ‘The poverty of postnationalism: citizenship, immigration, and the new Europe’, (2009) 38 *Theory and Society* 1-24; see also C Joppke, ‘The vulnerability of non-citizens’, (2009) 39 *Perspectives on Europe* 18-21; C Joppke, ‘Transformation of Citizenship: Status, Rights, Identity’, (2007) 11 *Citizenship Studies* 37-48.

<sup>40</sup> See D Kostakopoulou, ‘European Union Citizenship: Writing the Future’, (2007) 13 *European Law Journal* 623-646.

<sup>41</sup> See the references to ‘service to citizens’ and ‘citizens’ expectations’ in the Presidency Conclusions for the June 2004 European Council which saw political agreement on the Constitutional Treaty being reached: [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/81035.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/81035.pdf).

## C. Citizenship, free movement and the ‘old’ constitutionalism of the European Union

### 1. ‘Old’ and ‘new’ constitutionalism

The narrative of citizenship in the context of European integration predates by some distance the rather protracted and ultimately fruitless post-Laeken debates about formulating a single ‘constitutional’ text for the Union. (EU) citizenship, in its origins, belongs to an earlier perhaps more optimistic era, before the expectations and later anxieties of the 2000s about the fading promise of codifying a constitutional text for the Union. Indeed, from the 1970s onwards, drawing on what one might call the ‘proto-citizenship’ case law of the Court of Justice,<sup>42</sup> some lawyers were talking of an ‘incipient form’ of European citizenship.<sup>43</sup> ‘Citizenship’, in this sense, has long been linked to the manner in which the Court of Justice has interpreted the provisions of the Treaty governing the free movement and non-discrimination rights of individuals, and in particular its willingness—even in advance of legislative<sup>44</sup> and later Treaty developments<sup>45</sup>—to extend the categories of protected persons beyond the traditional groups of economically active persons protected by the EEC Treaties (workers, self-employed, service-providers) and to put in place a proportionality-based scrutiny of national restrictions on free movement and practices discriminating against a wider range of EU citizens present in other Member States, such as students, workseekers and service recipients. Interestingly enough, some of the main beneficiaries of this case law were students, some of whom have gone on to comment positively upon the interface between free movement, non-discrimination and citizenship in an academic capacity.<sup>46</sup>

Citizenship, in this sense, is also a part of what I would term the ‘old’ constitutionalism of the European Union.<sup>47</sup> This is a form of constitutionalism which, whilst ‘old’ in the sense of being rooted in the early days of the evolution of the EU legal order, remains as central as ever to understanding whether, how and why we can regard the EU today as a constitutionalised polity, not least since the Member States—in formulating the negotiating brief for the ‘Reform Treaty’ (i.e. what became the Treaty of Lisbon)—self-consciously disavowed the ‘constitutional’ mandate of the Laeken Declaration as well as the symbols and

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<sup>42</sup> E.g. Case 293/87 *Gravier v City of Liège* [1985] ECR 593; Case 186/87 *Cowan v Le Trésor public* [1989] ECR 195.

<sup>43</sup> See W Böhring, *The Migration of Workers in the United Kingdom and the European Community*, London: Oxford University Press, 1972, cited in B Wilkinson, ‘Towards European Citizenship? Nationality, Discrimination and Free Movement of Workers in the European Union’, (1995) 1 *European Public Law* 417-37 at 418; R Plender, ‘An Incipient Form of European Citizenship’, in F Jacobs (ed), *European Law and the Individual*, Dordrecht: North Holland, 1976, 39-52; A Evans, ‘European Citizenship: A Novel Concept in EEC Law’, (1984) *American Journal of Comparative Law* 679-715; G Ress, ‘Free Movement of persons, services and capital’, in Commission of the European Communities (ed), *Thirty years of Community law*, Luxembourg: OPOEC, 1981, at p302 has a section entitled ‘Are we on the way towards creating European citizenship?’.

<sup>44</sup> See the three Council Directives introduced in 1990 and 1993 (now repealed and replaced by European Parliament and Council Directive 2004/38 on Citizens’ Rights, OJ 2004 L158/77) which provided for the free movement of students, those of independent means, and retired persons.

<sup>45</sup> What was Article 8A EC, immediately after the entry into force of the Treaty of Maastricht, now Article 20(2)(a) TFEU, guaranteeing the right of citizens to move and reside freely within the territory of the Member States.

<sup>46</sup> If a note of personal ‘evolution’ may be permitted, I would observe that I belong to the pre-*Gravier* era of free moving students, having studied at the Institut des Etudes Européennes of the Université Libre de Bruxelles at a time when the *minerval* (or fee) imposed on foreign students and outlawed by *Gravier* (above n42) was still collected.

<sup>47</sup> See generally J Shaw, ‘One or Many Constitutions? The Constitutional Future of the European Union in the 2000s from a Legal Perspective’ (2007) *Scandinavian Studies in Law* Vol. 52, p393-408.

mottos of the Constitutional Treaty.<sup>48</sup> Thus ‘old’ constitutionalism persists, alongside the ‘reforms’ of the Treaty of Lisbon, which retain a paradoxical relationship with the ‘new’ constitutionalism of the failed Constitutional Treaty. Much of the text of the former is the same as the latter—but the constitutional vocation and mandate was stripped out and ‘abandoned’.<sup>49</sup> Meanwhile ‘old’ constitutionalism continues, comprising not only the rules governing the relationship between the EU and the national legal orders (supremacy, direct effect, etc.), the parallel principles of respect for limited competences and of implied powers, and the rule of law and judicial protection, combined with respect for fundamental rights, but also the core animating principles of the single market without which the EU legal order would, from the outset, have largely lacked a *raison d’être*. ‘Old’ constitutionalism thus brings (transnational) citizenship into the legal framework as a quasi-single market practice through the connection to free movement law, but citizenship in turn brings a human development angle which adds resonance to the effects of the legal order and in particular to the historic focus on *economic* integration from the neo-functionalist perspective which many scholars have argued underpinned the original European Economic Community treaty.

The connection between citizenship and ‘old’ constitutionalism in this sense was reinforced at the moment when citizenship was included in the EU Treaties. The main rights which were formally attached to the concept were precisely those transnational rights which are triggered when an individual exercises his or her free movement rights, and is resident in a Member State other than the one of which he or she is a national or, less commonly, when he or she returns to the home state after exercising free movement rights and faces obstacles to accessing, for example, welfare or educational benefits, as a result of having exercised free movement rights. The right to move and reside freely in the territory of the Member States is centrepiece of the Treaty rights (Articles 20(2)(a) and 21 TFEU), along with the right to vote and stand in local and European Parliament elections on the basis of residence, not citizenship, and under the same conditions as nationals (Articles 20(2)(b) and 22 TFEU). In addition, there are rights to diplomatic protection when citizens are outwith the territory of the Union, and rights concerned with good governance, transparency and access to the documents of the institutions, although the final group of rights are not exclusively confined to citizens but are also given to legal and natural persons *resident* in the Member States.

The link between these main citizenship rights and the right to non-discrimination on grounds of nationality (now Article 18 TFEU) is now, post-Lisbon, more evident than ever, as these two cornerstones of the EU legal order are included in the same part of the Treaty on the Functioning of the Union, headed ‘Non-Discrimination and Citizenship’. Moreover, the Court of Justice has linked them together in its case law, focusing on what was previously Article 17(2) EC, a freestanding statement that ‘Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby’, and emphasising that the right to non-discrimination is central to the ‘rights enjoyed’. It did this first in the groundbreaking case of *Martínez Sala*,<sup>50</sup> when it chose to adopt an approach to protecting the rights of a longstanding and apparently well integrated member of German society who none the less retained Spanish citizenship which cut across its previous case law on migrant workers and workseekers, and it has continued to do it ever since even though its case law has not always been entirely internally consistent. In fact, setting aside the right of residence, which is specifically articulated within the citizenship provisions but in language which

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<sup>48</sup> Presidency Conclusions, Council Document 11177/1/07, Rev 1, Concl 2, 20 July 2007, Annex 1, IGC Mandate.

<sup>49</sup> *Ibid*, point 1 of the Mandate.

<sup>50</sup> Case C-85/96 *Martínez Sala v Freistadt Berlin* [1998] ECR-I 2691.

apparently renders it subject to legislative implementation, and which thus has required creative judicial interpretation to render it directly effective,<sup>51</sup> the only ‘right conferred by this Treaty’ other than non-discrimination which the Court of Justice has invoked within the framework of a citizenship case is the general (Aristotelian) right to equal treatment (i.e. treating like situations alike, and unlike situations unlike). This came in its judgment in a reference for a preliminary ruling from a Dutch court concerning the right of Netherlands nationals (i.e. EU citizens) to vote in European Parliament elections when resident in Aruba—a non-European and quasi-autonomous territory of the Kingdom of the Netherlands.<sup>52</sup>

All of the above reinforces the argument that the most obvious quality of citizenship of the Union is above all its *transnational*, not its *postnational* character, an argument which fits well with much scholarship which has addressed the increasingly porous boundaries of *national* citizenships in the context of globalisation and Europeanisation.<sup>53</sup> This is precisely what led Paul Magnette, to use the term ‘isopolity’, drawn from the Greek traditions of city states, to describe the current basis of EU citizenship, and to deduce certain political conclusions from the choices made by the ‘masters’ of the Treaty:

‘The fact that the authors of the treaty have developed this horizontal dimension of citizenship, rather than the vertical bonds between the citizens and the Union, confirms that they intended to build a ‘federation of states’ rather than a ‘European state’. In the EU, as in the ancient leagues of Greek cities, the *isopoliteia* is more developed than the *sympoliteia*.’<sup>54</sup>

Because of the weakness of the vertical bonds, the ‘static’ European citizen, in contrast to the mobile transnational one, does not seem to derive many benefits from the institution of citizenship as a fundamental building block of the European Union. We shall focus on this question in the following two sections and see whether or not Magnette’s proposition still holds true to the same extent.

## 2. Citizenship, free movement and non-discrimination

We should now explore in more detail the extent to which the formalisation of a concept of citizenship has had an impact upon the evolution of free movement and non-discrimination law, in order to identify the significance of the citizenship/‘old’ constitutionalism interaction. This is an area where the Court of Justice has led the way, but where it is increasingly important also to have regard to the role of the legislature, especially when its work is viewed in combination with the Court of Justice. We can, for example, anticipate that there is likely to be an increasing body of case law on the interpretation of the Citizens’ Rights Directive of

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<sup>51</sup> In Case C-413/99 *Baumbast and R* [2002] ECR I-7091 the Court concluded that the right of residence as expressed in the EC Treaty was directly effective, thus allowing the Court to scrutinise the reasonableness and proportionality of the restrictions placed upon the right of free movement, in accordance with the text of the Treaty: Article 18 EC and now Article 21 TFEU; see also Case C-200/02 *Chen v. Secretary of State for the Home Department* [2004] ECR I-9925.

<sup>52</sup> Case C-300/04 *Eman and Sevinger v College van burgemeester en wethouders van Den Haag (Aruba)* [2006] ECR I-8055.

<sup>53</sup> See for example J Fox, ‘Unpacking “Transnational Citizenship”’, (2005) 8 *Annual Review of Political Science* 171-201.

<sup>54</sup> P Magnette, *Citizenship: The History of an Idea*, London: ECPR, 2005 at 177.

2004,<sup>55</sup> not least because the implementation of this directive at the national level has been a particular cause of concern for the Commission.<sup>56</sup> In its early case law which has addressed the directive, there has been some uncertainty about the Court's approach. On the one hand, it has given a broad interpretation of the rights of mobile EU citizens to be joined by their third country national family members,<sup>57</sup> and it has declined to allow the restrictions on the conditions placed on the right of residence in Directive 2004/38 to prevent it using provisions of the earlier Regulation 1612/68 which remain in force, in order to find a right of residence for non-self-sufficient EU citizen and third country national carers of EU citizen children in full time education in the host state, essentially by reference to a historical and tenuous relationship to the labour market.<sup>58</sup> On the other hand, it has taken a more equivocal and uneven approach to the challenge of working out the relationship between the restrictions which Member States may place on access to welfare benefits by mobile EU citizens, the derogations from the equal treatment principle permitted in the Directive (notably Article 24(2)), and the Court's own pre-existing case law on the relationship between what were—pre-Lisbon—Articles 12 and 18 EC (non-discrimination and the right of free movement).<sup>59</sup>

However, the central point here is to highlight the enthusiasm with which the Court of Justice, egged on at least initially by its Advocates General,<sup>60</sup> has embraced the possibilities of using the concept of citizenship of the Union in order to push its case law in directions which hardly seemed likely when these cases were 'merely' matters concerning the law on free movement and non-discrimination on grounds of nationality. It is true that even prior to the Treaty of Maastricht, in order to deal with cases where the putative beneficiaries of free movement and non-discrimination rights fell into marginal categories such as students, children, other persons not in the labour market such as carers and retired persons, and tourists, the Court already chose to deploy a teleological interpretation which pushed at the limits of the law. This was particularly visible in *Gravier*, where the Court put together the principle of non-discrimination on grounds of nationality along with an outline competence granted to the (then) European Economic Community in the field of vocational training (Article 128 EEC) in order to conclude that 'migrant' students had free movement rights within the territory of the Member States and were granted equal treatment with domestic students. But in the era of citizenship, the Court can add extra weight to its conclusions precisely by invoking this concept when it has to deal with the 'marginal' categories, who fall outwith the group of core economic actors. In so doing, the Court is simply making use of the extra tools put at its disposal. Thus, in recent years, the Court has overruled some of the conclusions which it reached in the era of 'mere' free movement. Overall, the Court has often reached conclusions which place greater weight on the value of free movement than they do

<sup>55</sup> European Parliament and Council Directive 2004/38 on Citizens' Rights, OJ 2004 L158/77.

<sup>56</sup> See n44 above for details of the Citizens' Rights Directive; on the role of the Commission in transposition and implementation see Commission Communication, *On Guidance for better transposition and application of Directive 2004/38/EC on the right of citizens and their family members to move and reside freely within the territory of the Member States*, COM(2009) 313, 2 July 2009, building on an earlier report of 2008 (COM(2008) 840).

<sup>57</sup> Case C-127/08 *Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-06241.

<sup>58</sup> See Case C-480/08 *Teixeira v London Borough of Lambeth*, judgment of 23 February 2010; Case C-310/08 *London Borough of Harrow v Ibrahim*, judgment of 23 February 2010. In the latter case it was a very brief engagement with the labour market on the part of the no longer present EU citizen father of the children.

<sup>59</sup> See Case C-209/03 *R v London Borough of Ealing, ex parte Bidar* [2005] ECR I-2119, Case C-11/06 *Morgan v Bezirksregierung Köln* and Case C-12/06 *Bucher v Landrat des Kreises Düren* [2007] ECR I-9161 and, taking a somewhat different approach, Case C-158/07 *Förster v Hoofddirectie van de Informatie Beheer* [2008] ECR I-08507. See generally O'Leary (above n.6).

<sup>60</sup> N Burrows and R Greaves, *The Advocate General and EC Law*, Oxford: Oxford University Press, 2007, Chapter 10: 'The Advocates General and the concept of citizenship'.



on states' choices about the distribution of educational benefits or other public goods.<sup>61</sup> Thus the logic of the case law has carried the Court a long way away from its original and more modest pre-citizenship case law, even if a continuum of development can be seen.

In *Bidar*,<sup>62</sup> a case on educational benefits for students concerning the closeness of the connection to the host state which students needed to show before they could be entitled to subsidised loans and grants, it reversed its earlier ruling in *Brown*<sup>63</sup> on the grounds of the value-added provided by the introduction of the citizenship provisions. Its treatment of the scope and effects of Article 7(2) of Regulation 1612/68 in *Martínez Sala*<sup>64</sup> is hard to square with earlier case law on the extent to which persons not active in labour market could receive the benefit of the non-discrimination principle such as *Lebon*.<sup>65</sup> Its approach to the differing rules on the formulation of surnames which exist in the Member States has seen a significant change of emphasis. In the era of *Konstantinidis*,<sup>66</sup> the Court preferred to ground its judgment on the existence of an economic link (however tenuous) between the rule under challenge (German rules on the transliteration of Greek names) and the presence of the applicant on the territory of the host Member States (as a self-employed *masseur* resident and working in Germany). Thus it opted for an approach based entirely on the risk of confusion in the marketplace faced by a person exercising their freedom of establishment under Article 49 TFEU, rather than choosing the broad based citizenship and fundamental rights approaches advocated by AG Jacobs who urged the Court to allow nationals of the Member States to assert their rights by stating that '*civis europeus sum*'. In the post-citizenship era, the issue in *García Avello*<sup>67</sup> was the 'right to a name', in that case the right of dual Belgian-Spanish national children to use, when in Belgium, the Spanish version of their surnames, incorporating elements of the mother's and the father's name, notwithstanding Belgian rules on the 'unity' of the family surname. In this case, the applicants themselves were born and had resided throughout their lives in Belgium. In approach, if not in outcome, *García Avello* effectively reversed *Konstantinidis*.<sup>68</sup> In other words, there is something in the Court's approach that involves more than the casual repetition of the 'destined to be the fundamental status' mantra,<sup>69</sup> and constitutes a real willingness to reconsider the (in some cases) longstanding boundaries of free movement law and to accept an ever remoter link to the actual exercise of free movement rights.

Thus in these cases concerned with the civil law status and recognition of individuals and their names we can note the dropping of the economic link. Accordingly the Court has been asked on a number of occasions to make dispositions about matters of national civil law (e.g.

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<sup>61</sup> A Menéndez, 'European Citizenship after *Martínez Sala* and *Baumbast*: Has European Law Become More Human but Less Social', in M Maduro and L Azoulay (eds), *The Past and Future of EU Law; The Classics of EU Law Revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty*, Oxford: Hart Publishing, 2010, 363-393 and M Dougan, 'Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?', in Barnard and Odudo, (above n10), 119-165.

<sup>62</sup> See *Bidar* (above n59). On workseekers see Case C-138/02 *Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703, as discussed in S O'Leary, *Developing an Ever Closer Union between the Peoples of Europe*, Edinburgh Mitchell Working Paper 6/2008 at 15.

<sup>63</sup> Case 197/86 *Brown v Secretary of State for Scotland* [1988] ECR 3205.

<sup>64</sup> See n50 above.

<sup>65</sup> Case 316/85 *Lebon* [1987] ECR 2811.

<sup>66</sup> Case C-168/91 *Konstantinides v Stadt Altensteig* [1993] ECR I-1191.

<sup>67</sup> Case C-148/02 *García Avello v Belgian State* [2003] ECR I-11613; see also Case C-353/08 *Grunkin and Paul v. Grunkin-Paul and Standesamt Stadt Niebüll* [2008] I-07639.

<sup>68</sup> For a more general discussion of the citizenship case law see J Shaw, 'A View of the Citizenship Classics: *Martínez Sala* and Subsequent Cases on Citizenship of the Union', Maduro and Azoulay (above n61), 356-362.

<sup>69</sup> See above n3.



rules on names) which fall beyond the scope of EU law in ordinary circumstances, but which are caught by the principle that the Member States must exercise *their* competences in compatibility with their duties under EU law. When combined with the Court's willingness to impose a low threshold for triggering the applicability of EU law, by requiring the Member States to take care not to place obstacles in the way of exercising free movement rights, this generates a huge potential for the Court to intrude substantially into areas which are matters for national law (and also into the realm of private law as well as in distributional matters). In its approach to surnames, it could be said that the Court is riding roughshod over some Member States' hesitancy about dual nationality. More seriously, as Agustín Menéndez has commented, the Court's activism in the field of social, welfare and educational benefits already raises doubts, because it has the capacity to disturb solidaristic bargains *within* (welfare) states, in the interests of promoting the development of human capital *between* them.<sup>70</sup> The justification given in cases such as *Grzelczyk*<sup>71</sup> to the effect that it is reasonable to expect a certain degree of solidarity *between* states, when it comes to balancing out the consequences of the mobility of students can simply ring hollow, especially in an era of straitened public finances. More striking has been the Court's willingness to use an integration test as the basis for determining the proportionality of national rules which, for example, use a residence test in order to substitute for traditional tests based on nationality. Here the Court has indicated that a certain length of residence as an indication of a genuine link with the host state is a reasonable restriction for Member States to impose.<sup>72</sup> The intrusiveness of the Court is also particularly striking where the case law has allowed citizens to export benefits which could only previously be enjoyed within the territory of the state, as it has in cases such as *Tas Hagen*<sup>73</sup> and *Morgan*.<sup>74</sup> In those cases, the national restrictions on export have failed the test of proportionality imposed by the Court of Justice. On the other hand, it is of interest that Síofra O'Leary discerns something of a 'spillback' effect from the citizenship case law into cases which otherwise were 'orthodox' migrant workers' cases, with the Court taking a more lenient approach to the proportionality of the national restriction than might otherwise have been expected, and indicating—where this had not previously been required—that a genuine link test might be allowable where previously the very fact of employment was sufficient.<sup>75</sup> It is clear, therefore, that the relationship between citizenship and free movement principles, and the way in which these are used by the Court of Justice may be symbiotic, but at times it is hard to predict how the Court will reason specific cases.<sup>76</sup>

The embrace of citizenship rhetoric has not, moreover, always been confined to what one might call the classic citizenship cases. Several Advocates General have put forward arguments grounded in the logic of citizenship in order to test the boundaries of free movement law more generally, including in relation to the free movement of goods and services. This is often used in the service of an argument in favour of the convergence of the different 'heads' of free movement law, *inter alia*, as an attack upon the restrictive interpretation of Article 28 EC on the free movement of goods and the requirement of direct or indirect discrimination, under the *Keck* principle.<sup>77</sup> The backdrop to the argument could be

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<sup>70</sup> See Menéndez (above n61).

<sup>71</sup> See n3 above.

<sup>72</sup> See *Bidar* above n62 and Case C-138/02 *Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703.

<sup>73</sup> Case C-192/05 *Tas-Hagen* I-10451.

<sup>74</sup> Case C-11/06 *Morgan v Bezirksregierung Köln* [2007] ECR I-9161.

<sup>75</sup> O'Leary, above n62 at 16-24.

<sup>76</sup> For an example of a case reasoned on the basis of what was then Article 39 EC, see Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, judgment of 4 June 2009.

<sup>77</sup> Case C-145/88 *Criminal Proceedings against Keck* [1993] ECR I-6097.

seen as the claim made by Jukka Snell that Court has taken a different line with free movement rights involving citizens' rights compared to those 'merely' involving products.<sup>78</sup> Thus arguments that link citizenship to *all* of the freedoms rather than just those involving obvious signs of human movement or human capital development can be seen as focused specifically at attacking certain restrictions placed on the free movement of goods.<sup>79</sup> A classic linkage statement can be found in the Opinion of Advocate General Maduro in the *Alfa Vita Vassilopoulos* case:

‘such a harmonisation of the systems of free movement seems...to be essential in the light of the requirements of a genuine Union citizenship. It would be desirable for the same system to be applied to all the citizens of the Union wishing to use their freedom of movement or freedom to move services, goods or capital as well as their freedom to reside or to set up the seat of their activities in the Community.’<sup>80</sup>

Here, therefore, we have a clear normative statement from a member of the Court. According to Maduro, there is a link between market citizenship and ‘genuine’ Union citizenship, and that could be constituted via the means of a convergence of market freedoms. This would occur, presumably, around the norm that offers most opportunities to the market citizens (who, after all, when it comes to products and services, represent 100% of the residents of the Member States, rather than the much smaller percentage of persons who actually make use of the free movement of persons) and places most restraints on the autonomy of the Member States. However, this is terrain, as we shall see below, that the Court of Justice should be hesitant about entering, as few can agree about what constitute the appropriate limits to Union citizenship.

### 3. Citizenship's limits?

One could speculate as to how far the process of extending rights to migrant EU citizens based on having achieved integration into the host state might in future be taken, especially once the conundrum is reformulated as follows: citizens of the Union should not be deprived of rights which they could otherwise exercise or benefit from just because they have exercised their free movement rights and moved to another Member State. Dimitry Kochenov has recently gone so far as to suggest that this argument could be applied to the scenario where nationals of the Member States lose the right to vote in any parliamentary elections when they exercise their right of free movement, because there are very restricted rights to vote for non-nationals at the national level and patchy coverage of expatriate/external voting

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<sup>78</sup> J Snell, ‘And Then There Were Two: Products and Citizens in Community Law’, in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-first Century. Rethinking the new legal order*, vol. 2, Oxford: Hart Publishing, 2004, 49-72.

<sup>79</sup> See also Case C-72/03 *Carbonati Apuani Srl v Comune di Carrara* [2004] ECR I-08027, for a further invocation of citizenship by AG Maduro in a case concerning the free movement of goods. For a more general discussion of these questions see A Tryfonidou, ‘Further steps on the road to convergence among the market freedoms’, (2010) 35 *European Law Review* 36-56.

<sup>80</sup> Cases C-158 & 159/04 *Alfa Vita Vassilopoulos AE v Greece* [2006] ECR I-8135 [51]. See also the manner in which Advocate General Sharpston buttresses her argument about so-called ‘wholly internal situations’ and thus the scenario of reverse discrimination in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-01683 [133 and following] by reference to the concept of citizenship.

rights.<sup>81</sup> Such restrictions might also in future be subjected to a proportionality test, taking the decision about whether to allow external voting out of the hands of the national legislature, and giving it—in effect—to the judges of the Court of Justice (or the national court applying EU law).

Of course, the classic answer to the loss of political participation rights experienced by any person who migrates across national boundaries is to point to the possibility of naturalisation—which automatically allows the migrant to join the political community through the ultimate act of integration. Here again, some remarks could be made. First, it is arguable that the exercise of EU free movement rights differs from the classic immigration scenario where a person moves from country A to country B (with or without his or her family) and integrates in the latter state, acquiring along the way full membership of the polity through naturalisation. Regardless of whether such a scenario accurately reflects much contemporary international migration, it is certainly a poor fit with the ideology of free movement in the contemporary European Union. This would be much better expressed in terms of a series of moves involving lifestyle choices: for educational purposes; for love; for caring responsibilities; for economic reasons; for retirement; for leisure. On that scenario, it is arguable that there will be a net loss of political engagement amongst European citizens if Member States do not take care that the 11 million persons who are resident outside their home state (who represent 2.5 per cent of the population of the Member States and one third of the total foreign resident population<sup>82</sup>) can vote in what remains at present the ‘gold standard’ of political participation, namely the election of national parliamentarians, which leads in turn to the formation of the governments of the Member States (who then participate in the Council of Ministers as a decision-making body in the EU). Second, if this were to be regarded as a barrier to free movement, then a number of routes exist to eliminating what might be regarded as an anomaly, via universal expatriate voting, automatic naturalisation,<sup>83</sup> or perhaps some form of mutual recognition amongst the Member States.<sup>84</sup> And indeed *if* it is a barrier to free movement, then that might imply that the EU has some power to regulate to in order to harmonise national laws or to remove the barrier. However, it is not clear how this would be possible under the Treaties at present, and to suggest that a Treaty change comparable to the introduction of the local and European Parliamentary electoral rights in the form of Article 19 EC (now Article 22 TFEU) is likely in the foreseeable future seems to depart radically from current political realities.

Similar arguments could, of course, be made about the differing requirements that the Member States currently impose in respect of naturalisation, with only a minority presently imposing different—more lenient—rules in respect of nationals of other Member States compared to their general rules.<sup>85</sup> Perhaps it is indeed the obstacles to acquiring national citizenship, combined with the rights which are denied to non-nationals such as voting rights in national elections, which account—notwithstanding the best efforts of the European institutions to ensure that Union citizens really are treated as privileged non-nationals in the host state—for the persistently low level of intra-EU migration, when compared to the United

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<sup>81</sup> D Kochenov, ‘Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?’ (2009) 16 *Maastricht Journal of European and Comparative Law (MJ)* 197-223.

<sup>82</sup> Eurostat Statistics in Focus, 94/2009, *Citizens of European countries account for the majority of the foreign population in EU-27 in 2008*.

<sup>83</sup> See the discussion and possibilities canvassed in Kochenov, above n26.

<sup>84</sup> See Shaw, above n27, 189-208.

<sup>85</sup> See Kochenov, above n26; for further details see the extensive national reports available at [www.eudo-citizenship.eu](http://www.eudo-citizenship.eu).

States, where a migrant American automatically takes on the citizenship of the state in which he or she is resident<sup>86</sup> and where cross-state mobility is generally assumed to be a great deal more common and easier to achieve.<sup>87</sup> On the other hand, no one should disregard the cultural and language barriers which present disincentives to mobility, nor indeed the likelihood of loss of professional status and the persistent low level xenophobia which is prevalent in many Member States. Evidence of this can be seen in an insistence in the UK, for example, on calling Polish or Lithuanian workers in the UK ‘A8 nationals’ six years after the accession which gave them the prefix ‘A’, even in a report of the Equality and Human Rights Commission which precisely ought to understand the exclusionary power of language.<sup>88</sup>

In any event, it would suggest a significant development in the approach which the Court of Justice has hitherto taken to examining national rules on the acquisition and loss of nationality for it to subject these to a proportionality test, simply because there were differences between Member States which might impinge upon individual decision-making in relation to the mobility of human capital, or because they impact upon EU citizenship *per se*. In the case of *Rottmann*,<sup>89</sup> however, it is arguable that the Court has made precisely this step change in its treatment of Union citizenship. It is therefore important to examine in some detail the development of the Court’s approach to assessing the relationship between Union citizenship and citizenship of the Member States.

In *Micheletti*,<sup>90</sup> even before the introduction of Union citizenship, the Court confirmed that while Member States remain competent alone to define the scope of their citizenship laws in order to determine who are their citizens, when the host state is faced with a person who has the nationality of a Member State and also the nationality of a third state, it is obliged to recognise that part of a person’s dual (or multiple) nationality which gives them access to free movement and non-discrimination rights. Post-Maastricht this meant that Member States must recognise the Union citizenship of nationals of other Member States also holding the nationality of a third state. This was the approach which the Court took in *Chen*,<sup>91</sup> when it required the UK to recognise in full the implications of the broad *ius soli* provisions of Irish citizenship law under which a person born in Northern Ireland would become a citizen of the Republic of Ireland. In his generally cautious Opinion in the case of *Rottmann*,<sup>92</sup> Advocate General Maduro acknowledged that Member States are obliged to apply their nationality laws in ways which comply with the requirements of EU law and envisaged a number of scenarios where problems could arise. First, there could be actions which are in some way directly related to the free movement rules, such as arbitrary removal of nationality of a naturalised former citizen of another Member State on the grounds of political activities or membership of a trades union. Alternatively, there could be actions which breached the Article 4 TEU

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<sup>86</sup> See the Citizenship Clause of the Fourteenth Amendment to the US Constitution.

<sup>87</sup> The situation, almost inevitably, is a good deal more complicated when a close comparison is made: see P Ester and H Krieger, ‘Comparing labour mobility in Europe and the US: facts and pitfalls’, (2008) *Tijdschrift van het Steunpunt WSE* 3-4/2008, 94-98.

<sup>88</sup> M Sumption and W Somerville, *The UK’s New Europeans. Progress and Challenges five years after accession*, Equality and Human Rights Commission Policy Report, 2009; however, to be fair, for the most part this chapter does refer to this group of migrants as ‘European citizens’.

<sup>89</sup> Case C-135/08 *Rottmann v Freistaat Bayern*, judgment of 2 March 2010.

<sup>90</sup> Case C-369/90 *Micheletti v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239.

<sup>91</sup> See above n32. For an analysis of *Chen* in terms of its implications for the national/EU citizenship law relationship see B Kunoy, ‘A Union of national citizens: the origins of the Court’s lack of *avant-gardisme* in the *Chen* case’, (2006) 43 *Common Market Law Review* 179-190.

<sup>92</sup> Case C-135/08 *Rottmann*, above n89, Opinion of Advocate General Maduro of 30 September 2009.

duty of sincere cooperation, such as collective naturalisations of third country nationals which would have impacts on other Member States through the effects of the free movement rules and which could be said to subvert their immigration policies.

However, the Court's judgment in *Rottmann* seems a good deal bolder than the Opinion, and suggests that we may soon need a new way of thinking about the reach and effects of Union citizenship *vis-à-vis* national law, especially national rules on the acquisition and loss of citizenship, depending both upon how the Court applies the principles it appears to have announced in *Rottmann* in the future and upon how national courts take up the challenge which they have been given in this case.

In *Rottmann*, the complainant was threatened with the withdrawal of the citizenship of Germany which he gained through naturalisation, on the grounds that he committed a fraud during the application process because he failed to disclose criminal proceedings brought against him in Austria, his state of origin. On naturalisation in Germany, however, Rottmann had, by operation of law, lost his Austrian citizenship, and as things stood he would not automatically regain his Austrian citizenship just because he lost his German citizenship. He risked, therefore, the loss of his EU citizenship, because he would no longer hold any citizenship which gave him access to EU citizenship and its associated rights.

In its judgment the Court rejected the contention that the case concerned a 'wholly internal situation', on the basis that it involved a decision of a German administrative authority about the status under German law of a German citizen. It noted that while it is for each Member State to lay down the conditions for the acquisition and loss of nationality, they must none the less do so 'having due regard to Community law'<sup>93</sup> in 'situations covered by European Union law'.<sup>94</sup> Where the essence of the AG Maduro's Opinion was that the loss of citizenship here was not related to the exercise of free movement rights in such a way as to render it subject to scrutiny under EU law, the Court in contrast made a very strong statement about the 'reach' of Union citizenship and consequently the capacity of Member States to withdraw national citizenship where that results in the loss of Union citizenship:

'It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC [i.e. Union citizenship] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law'.<sup>95</sup>

In *Rottmann* the connection which the Court draws between EU law and national law is the simple fact that by losing national citizenship a person will also lose EU citizenship rights. This seems to be a step beyond the approach in *Micheletti* where the Court formulated the issue thus:

'it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition

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<sup>93</sup> [39].

<sup>94</sup> [41].

<sup>95</sup> Emphasis added; [42].

for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.<sup>96</sup>

The *Rottmann* formulation is justified by reference to the oft-repeated statement that ‘citizenship of the Union is intended’<sup>97</sup> to be the fundamental status of nationals of the Member States’,<sup>98</sup> but significantly the Court omitted the second part of this quotation which refers to the equal treatment principle and the transnational element of Union citizenship.<sup>99</sup> Later on, the Court emphasised again ‘the importance which primary law attaches to the status of citizen of the Union’.<sup>100</sup> It will be interesting to see how far the Court’s reasoning can be stretched and what its impact upon national rules on the acquisition and loss of citizenship might be. Could it result, for example, in the scrutiny of the German nationality law which requires a person who has acquired German nationality by birth in the territory as the child of a legally resident non-national to opt, within five years of reaching the age of eighteen, for either German nationality or the nationality acquired by descent? This rule only applies to those who hold dual German/third country national citizenship, since Germany does not object to citizens of other Member States continuing to hold dual citizenship. Not renouncing the nationality acquired by descent in such circumstances means losing EU citizenship. Is this an issue falling ‘by reason of its nature and its consequences’ within the ambit of EU law? What about refusals to grant naturalisation—which is often a wholly discretionary act under national law. In order to permit judicial review, is it now necessary that such national decisions must *always* be reasoned? It is intriguing that the Court reached this conclusion even though it wanted to assure the Member States that taking action in such a case of false representations in the context of naturalisation does correspond ‘to a reason relating to the public interest. In this regard, it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality’.<sup>101</sup> In practice, despite this reassurance, it may prove very hard for Member States to resist substantial encroachment in their national sovereignty in this field. The very fact of raising challenges to the scope of national citizenship law in national courts and asking the courts to exercise a proportionality test may represent a significant challenge and a factor of perturbation for Member States in an arena which has hitherto been one of primary national legislative sovereignty and also one where executives have often prevailed over courts, with little control over executive discretion in many states.

The second important dimension of the *Rottmann* case was the Court’s conclusion that the appropriate standard of review is a test of proportionality. It is for the national court

‘to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law’.<sup>102</sup>

This is an explicit invitation to national courts to weigh considerations relating to the national interest (i.e. the severity of the deception, for example) against the significance of losing EU

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<sup>96</sup> *Micheletti* above n8, [10].

<sup>97</sup> Note the slight change of language from ‘destined’ to ‘intended’.

<sup>98</sup> *Rottmann*, [43].

<sup>99</sup> See above at n5.

<sup>100</sup> *Rottmann*, [56].

<sup>101</sup> *Rottmann*, [51].

<sup>102</sup> *Rottmann*, [54].

citizenship (loss of free movement rights and other Union citizenship rights; possible impact upon family members, etc.).

To conclude, it would appear that while the link between citizenship and the free movement and non-discrimination foundations of the EU has been a dynamic motor of legal development, it may be that the Court has opened the door in *Rottmann* to a new phase in its case law. *Rottmann* is arguably the logical conclusion of a line of case law in which the Court has countenanced ever more remote links with the putative exercise of free movement rights as justifying scrutiny and control of national laws and policies. However, the suggestion that the Court may scrutinize national citizenship rules for their impact on the putative as opposed to actual exercise of free movement rights may have the effect of further hollowing out national citizenship. Whether the implications of the judgment are fully accepted within the national legal orders or whether—as with other steps taken by the Court of Justice in the service of ‘old’ constitutionalism such some of its case law on fundamental rights—it provokes a backlash at the national level remains to be seen.

But all of this still leaves open the question as to precisely what the content of citizenship at the Union level may be, not least because questions about solidarity remain so contested, such that many judgments do not find ready acceptance at national level.<sup>103</sup> Questions persist about the legitimacy of the way in which the Court has privileged individual human capital development over collective decision-making in relation to the (relatively) scarce resources of the welfare state.<sup>104</sup> The dominant focus on transnationalism moreover leaves a huge question mark, as many have commented, in relation to the so-called ‘wholly internal situations’. As has often been said, what—in truth—is an ‘internal situation’ within an evolving single market where the elimination of national frontiers and barriers to free movement is sought? For the reverse side of the coin of the ‘wholly internal situation’, which is unrelated to the application of EU law, is that it would appear that Member States can apply different, and stricter, standards to nationals who do not exercise their free movement rights than to those who do not. Many have observed that this situation seems unjust, and it seems even more challenging in circumstances, such as those at issue in *Carpenter*,<sup>105</sup> where the connection between the EU citizen seeking to assert a right to family reunification (in order to remove a threat to deport his third country national spouse) and free movement rights (sometimes acting as a service provider in another Member State) seems tenuous at the best.

So long as the Court of Justice declines, however, to leave the safe haven of its ‘wholly internal situation’ case law,<sup>106</sup> and tackle the challenge of reverse discrimination, it remains important to consider how this concept of market citizenship could be relevant for the vast majority of citizens of the Member States who are ‘static’ and who do not take advantage—other than for temporary travel mainly for leisure or business—of their free movement rights. On that reading, for a fuller and more politically-rounded concept of citizenship to evolve, there is a wider challenge which goes beyond the development of the free movement oriented provisions introduced by the Treaty of Maastricht and tenderly husbanded since then by the Court of Justice, with some assistance from the Commission and the Union’s legislature. If

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<sup>103</sup> Reactions to *Metock* (n57), and to *Ibrahim* and *Teixeira* (n58) are good cases in point. On this issue see A Lansbergen, ‘Metock, implementation of the Citizens’ Rights Directive and lessons for EU citizenship’, (2009) 31 *Journal of Social Welfare and Family Law* 285-297.

<sup>104</sup> See Menéndez above n68.

<sup>105</sup> Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

<sup>106</sup> For the standard recitation of the ‘no factor linking the case to any of the situations envisaged by Community (sic) law’ formula, see *Government of the French Community and Walloon Government* [33].

the Union is to have a citizenship which extends a meaningful experience of membership to all residents on its territory, then this must—by definition—have a stronger political character than can be deduced from a picture of busy transnational citizens relying upon their EU derived rights in order to better their personal situation or to enhance their human capital. We must turn, therefore, to the ‘new’ constitutional travails of the Union. And there, as was suggested at the beginning of the chapter, we see a very different conjunction of institutional interests and a much greater reluctance to take advantage of the political symbolism of citizenship, other than as a tool of political rhetoric.

#### **D. Citizenship: lost in transition from ‘old’ to ‘new’ constitutionalism**

This section shows how citizenship—rather easy to develop as a creature of the basic transnational character of the EU, where it operates in a positive relation with the EU’s old legal constitutionalism—has not found such a secure and comfortable position in debates about a ‘new’ constitutionalism for Union. One of the key reference points in what follows is provided by the changes to the Treaty framework introduced by the Treaty of Lisbon, understood as a compromise document, but the evidence can be drawn from throughout the uneasy period that followed the conclusion of the Treaty of Nice in 2000. While an effective—albeit largely non-political—concept of citizenship *of the Union* is strongly anchored in the EU’s ‘old’ constitutionalism of the single market and the supranational legal order, in particular through the connection to transnational market and quasi-market practices, there has not been a similar breakthrough which would offer an acceptable definition of what it means, in political terms, to be a citizen of a euro-polity founded on a formal constitutional framework. Does it mean the same as being a citizen of a ‘national’ polity, but simply writ large? Or do we need some sort of new vocabulary with which to address such questions of belonging which breaks the bonds of citizenship’s binary divides of inclusion and exclusion?<sup>107</sup> And, above all, how do concepts of democracy and democratic legitimation, as key citizenship practices, translate in the context of the plural and multi-level character of euro-polity, with its demand, as we noted in Section B, for multiple and linked approaches to questions of accountability to stakeholders, including citizens, at the supranational, national and indeed the subnational level.<sup>108</sup>

After a brief discussion of what might be thought of as a semantic change in how the EU Treaties express the relationship between national citizenship and citizenship of the Union, the main part of the discussion proceeds by looking more closely at political citizenship in the Union. Here we can consider the two cases in which the Court of Justice has so far had an opportunity to engage with the right to vote in European Parliament elections. These are reviewed in the light of some further changes to the terminology of the Treaty on European Union, instituted by the Treaty of Lisbon. A related question concerns the significance of the fact that the Treaty of Lisbon, unlike the Constitutional Treaty before it, does not refer to the ‘will’ of the citizens in relation to the establishment of the Union. Finally we turn to some substantive reforms in the area of democratic procedures introduced by the Treaty of Lisbon,

Inevitably, in what follows, there is some normative assessment of these changes, and in particular of differences between the Treaty of Lisbon and the Constitutional Treaty, on the one hand, and between Treaty of Lisbon and the earlier Treaties of Maastricht and

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<sup>107</sup> See for example Walker, above n.34.

<sup>108</sup> See above at n16.



Amsterdam on the other hand. However, that is not the main objective of the presentation which is to present, as explained above, how these issues have emerged from the debates amongst key actors, and to highlight the differences between how citizenship is constructed under conditions of classic 'old' constitutionalism and how it fares under the mixed new/old regime of the Treaty of Lisbon.

### *1. The difference which (Union) citizenship makes: complementarity or additionality?*

In both the pre- and post-Lisbon texts, it is made clear that EU citizenship does not *replace* national citizenship; this wording was introduced by the Treaty of Amsterdam partly as a result of the Danish negative referendum on the Treaty of Maastricht which delayed its ratification, and in view of the European Council conclusions which followed at a summit in Edinburgh in December 1992.<sup>109</sup> However, after the Treaty of Lisbon, the Treaties provide that Union citizenship is *additional* to national citizenship (Article 20(1) TFEU), replacing the earlier expression that it is *complementary* (Article 17(1) EC). Is this change purely semantic, or does it have some deeper meaning?

Expressing Union citizenship as *additional* to national citizenship was insisted upon by the Member States, in order to reinforce the point that EU citizenship can only *add* rights, and cannot *detract* from national citizenship. It reflects the earlier Edinburgh Agreement. Andrew Duff suggests it was done 'cleverly, to mollify conservative eurosceptic opinion'.<sup>110</sup>

For Duff and other parliamentarians, a bigger threat was posed to the essence of Union citizenship by the possibility that citizenship might not be mentioned in the Treaty on European Union at all. However, in its final version signed in December 2007, Article 9 TEU provides:

'In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.'

The final two sentences, drawn from the text of Article 20(1) TFEU, were included in the Treaty of Lisbon at the behest of the European Parliament representatives in the IGC.<sup>111</sup> The parliamentarians had adopted citizenship of the Union as a political priority because of its symbolic importance.<sup>112</sup> It is obviously clumsy to have such textual repetition between the TEU and the TFEU, but it was unavoidable in this particular context given what the parliamentarians saw as a severe threat to the status of citizenship if it was not mentioned in terms in the TEU itself.

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<sup>109</sup> The text of the Agreement can be found on a Danish Parliament website dealing with Danish opt-outs: [http://www.eu-oplysningen.dk/emner\\_en/forbehold/edinburgh/](http://www.eu-oplysningen.dk/emner_en/forbehold/edinburgh/).

<sup>110</sup> A Duff, *The Struggle for Europe's Constitution*, London: Federal Trust, 2005 at 56.

<sup>111</sup> See the interviews with two of the European Parliament representatives at the 2007 IGC (Enrique Baron Crespo, Elmar Brok) for the webzine of the Young European Federalists, available at <http://www.taurillon.org/IGC-on-the-Reform-Treaty-Interview-with-MEPs>.

<sup>112</sup> See also the emphasis placed on citizenship by Andrew Duff, the third of the 2007 European Parliament IGC representatives, in his book on the Constitutional Treaty: *The Struggle for Europe's Constitution*, London: Federal Trust, 2005.

Legally speaking, additionality, reinforcing the duality between national and EU citizenship as legal statuses seems to be a more accurate delineation of the relationship between the two, and avoids any unfortunate implications that there is somehow a notion that one status should bend to the will of the other, in order to achieve the sought after ‘complementarity’.<sup>113</sup> Conceptually speaking, it makes the point that the development of different layers of citizenship entitlements is not a zero sum game, in which rights given at one level must necessarily detract from those given at another level. In that sense, it is not so far from—but avoids the negative connotations of—the controversial wording contained in the first draft of Part One of the Constitutional Treaty prepared by the Praesidium to the Convention on the Future of Europe. This referred to citizens having ‘dual’ citizenship: EU and national, and being ‘free to use either, as he or she chooses’.<sup>114</sup> Gráinne de Búrca subjected this wording to some trenchant criticism back in 2003:<sup>115</sup>

‘The notion of a dual citizenship is an unfortunate way of describing the co-existence of national and EU citizenship. If it is intended as a description of the currently existing relationship between EU and national citizenship it is misleading, and if it is intended to define these categories in a new way for the future, under the basic Constitutional Treaty, then it is a regrettable move. The concept of dual citizenship suggests full and competing loyalties/relationships to two different and entirely separate polities, each of which makes similar claims of allegiance on the individual.’

Perhaps these criticisms were heard, because in subsequent versions of Part One of the Constitutional Treaty it was the additionality formula which prevailed. Annette Schrauwen takes a positive view, suggesting that this formula represents one step towards a ‘more autonomous development of Union citizenship’.<sup>116</sup>

Despite these comments, the shift from complementarity to additionality seems unlikely to make a substantial difference to the political trajectory of EU citizenship. Thus far, at least until *Rottmann*, the cases in which the Court of Justice has placed weight upon the status of EU citizenship, from *Martínez Sala* onwards, have not truly detracted from the *status* and *legal boundaries* of national citizenship, except in terms of undermining its exclusivity by, for example, extending the territorial boundaries of the welfare state or in relation to the capacity of the national legislature to set rules on matters such surnames. But again, it should be reinforced that these have hitherto been cases involving migrant citizens. Whether and how additionality might play out as Union citizenship gradually becomes more significant within rather than solely across the boundaries of the Member States is as yet unclear.

## 2. The nature of EU political rights

The provisions governing the nature of the European Parliament in the amended Treaty on European Union refer post-Lisbon to ‘citizens’, where previously the analogous provisions in the EC Treaty referred to the ‘people’. Article 14(2) TEU provides that: ‘The European

<sup>113</sup> For a strong normative defence of complementarity which – it can be assumed – would not be opposed to the principle of ‘additionality’ see Bellamy, ‘Evaluating Union citizenship’, above n22.

<sup>114</sup> See Conv 360/02 of 28 October 2002 at 9.

<sup>115</sup> G de Búrca, ‘Fundamental Rights and Citizenship’, in B de Witte (ed), *Ten Reflections on the Constitutional Treaty for Europe*, Florence: European University Institute, 2003, 11-44 at 13.

<sup>116</sup> See A. Schrauwen, ‘European Union Citizenship in the Treaty of Lisbon: Any Change at all?’, (2008) 15 *Maastricht Journal of European and Comparative Law* 55-64 at 59-60.

Parliament shall be composed of representatives of the Union's citizens...'; Article 10(2) TEU states that 'citizens are directly represented at the Union level in the European Parliament'; and Article 10(3) TEU states that 'Every citizen shall have the right to participate in the democratic life of the Union.' The text of Article I-19(2) of the Constitutional Treaty<sup>117</sup> providing for the European Parliament to be elected 'by direct universal suffrage of European citizens in free and secret ballot' is not in the post-Lisbon TEU, but the reference to universal suffrage in connection with the European Parliament does appear in Article 39 of the Charter of Fundamental Rights.<sup>118</sup> The Charter is recognised under Article 6(1) TEU post-Lisbon as a legal source of equal standing to the Treaties.

In any event, the status of the principle of universal suffrage under EU law (whether by virtue of the Charter, or by virtue of Article 3 of Protocol No. 1 of the ECHR) had already been clarified even before the Treaty of Lisbon, as a result of the judgments of the Court of Justice in the *Gibraltar* and *Aruba* cases.<sup>119</sup> It is implicit in the Court's important judgments in these politically sensitive cases about the scope of voting rights in European Parliament elections that European citizens have a right, as a matter of democratic principle, to vote for 'their' parliament. This emerges especially clearly from the *Aruba* case concerned with the right of EU citizens resident in Aruba (a dependent territory of the Kingdom of the Netherlands which is not part of the European Union) to vote in European Parliament elections. The provisions of both Article 19 EC and Article 22 TFEU only provide explicitly for an *equal treatment* right, whereby nationals of the Member States resident in *other* Member States have the right to vote in European Parliament under the *same conditions* as nationals. There has, hitherto, never been a text in the EU Treaties which states, in terms, that 'the citizens of the Union shall elect the members of the European Parliament.' However, an important conclusion can be drawn, in particular from the *Aruba* case, that citizens of Union cannot be deprived of their right to vote in European Parliament elections, if the national legislation which excludes them from the franchise fails a basic rationality test because, as in this case, the Arubans could gain a right to vote in European Parliament elections not only by moving to the Netherlands proper, but also by moving to a third country and taking advantage of Netherlands external voting rights. This amounts to recognising the right to vote in European Parliament elections as a normal incident of EU citizenship, even if this is not explicitly stated in the Treaties. In fact, the Advocate General explicitly made this point in his joint Opinion on the two cases and he argued that the right to vote in European Parliament elections is *the most important* EU citizenship right.<sup>120</sup>

The shift from the language of 'people' to that of 'citizens' in relation to the European Parliament raises important questions about the allocation of seats. The principle of 'degressive proportionality' was enshrined in Article 14(2) TEU, and its application already caused some difficulty with respect to the allocation of seats to Italy during the 2007 IGC. This led to establishment of the 'fudge' whereby the European Parliament will constitute 750 members, plus one—the President—in order to accommodate one extra MEP for Italy.

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<sup>117</sup> See OJ 2004 C310/1.

<sup>118</sup> See the Charter as adapted post-Lisbon: OJ 2007 C303/1.

<sup>119</sup> Case C-145/04 *Spain v United Kingdom (Gibraltar)* [2006] ECR I-7917; Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag (Aruba)* [2006] ECR I-8055. For an extended discussion of these cases see J Shaw, 'The political representation of Europe's citizens: Developments', (2008) 4 *European Constitutional Law Review* 162-186. See also Besselink (above n14).

<sup>120</sup> Opinion of AG Tizzano of 6 April 2006, para. 67: 'it can be directly inferred from Community principles and legislation as a whole, thus overriding any indications to the contrary within national legislation, that there is an obligation to grant the voting rights [in European elections] to citizens of the Member States and, consequently, to citizens of the Union.'

Hitherto the calculation base for Member State populations, both for EP purposes and for purposes of QMV in the Council of Ministers has been that of the number of residents rather than the number of nationals. This avoids difficult questions about the divergences in national laws on citizenship acquisition. For example, if a Member State has national rules which make acquisition of national citizenship so hard that this artificially deflates the number of national citizens, should this be taken into account when assessing the relevant numbers for purposes of calculating MEPs or QMV weightings?<sup>121</sup> There are also more advanced statistical methods available for estimating the number of residents present on the territory between the dates of comprehensive national censuses than there are for calculating the number of national citizens. Even so, Italy was successful in raising a specific issue about numbers of citizens abroad as part of the array of arguments it used to lay claim to the same number of MEPs in the 2009-2014 Parliament as the UK, where the principle of degressive proportionality seemed to demand that it should have one less. It remains to be seen whether any future reforms of the European Parliament electoral procedures, such as are currently under review before the Committee on Constitutional Affairs,<sup>122</sup> might take on board this shift from ‘people’ to ‘citizens’. In his presentation of these matters for the Committee in a preliminary paper, Duff made it rather clear where his own preferences lay:

‘[D]o we follow James Madison’s belief that, in the republic, parliamentary representation is more of a birthright than a civic privilege? The Madisonian approach suggests that the European Parliament represents not only *de jure* EU citizens (as formally established by the EU Treaty), but that it also represents, and has a duty of care towards, anyone else who abides in the territory of the Union, including minors and denizens. That being the case, the traditional method of distributing seats in the Parliament on the basis of total population—to say nothing of counting votes in the Council—is the right one and should not be amended.’<sup>123</sup>

Finally, the question arises as to whether the rewording in the Treaty of Lisbon would make any difference if the issues such as those which arose in the *Gibraltar* case came before the Court of Justice once again. In that case, the Court of Justice was faced with a challenge by Spain to the UK’s policy of including Commonwealth Citizens in its normal franchise for European Parliament elections. The particular scenario at issue concerned Gibraltar, which was only first included in European Parliament elections in 2004, following a case brought by Gibraltarians before the European Court of Human Rights contesting their prior exclusion from the framework of European Parliament elections in the United Kingdom.<sup>124</sup> The proceedings before the Court of Justice encompassed an interesting discussion by Advocate General Tizzano of the provisions of the EC Treaty on the European Parliament. He concluded that the reference to ‘peoples’ of the Member States in Articles 189 and 190 EC should be treated as largely coterminous with the citizens or nationals of the Member States (thus avoiding alternative ‘ethnic’ rather than ‘civic’ connotations of the term ‘peoples’), which would suggest that it makes little difference that the TEU post-Lisbon now explicitly refers to citizens. On the other hand, he denied that the people/citizens, so defined, and the electorate for the European Parliament should not be treated as automatically coextensive, an argument which the Court of Justice also accepted. The Court concluded that there was

<sup>121</sup> See the discussion by Andrew Duff in a Working Document for the European Parliament Committee on Constitutional Affairs on the Election of the European Parliament (III), PE400.478v01-00, 18 January 2008 at 2-3.

<sup>122</sup> See the papers prepared by Duff above n.121 in that context.

<sup>123</sup> Duff, (above n.121) at 3.

<sup>124</sup> *Matthews v UK* Appl. 24833/94, judgment of 18 February 1999, [1999] 28 EHHR 361.

nothing in the text of the Treaties at they were at the time, in their pre-Lisbon format which is now essentially unchanged, to suggest that it was not reasonable for Member States, which had such a constitutional tradition, as the UK does in relation to Commonwealth citizens, extending the right to vote in such elections to persons with a close connection to the territory, recognised in national law. The Court noted that other EU ‘citizenship’ rights are non-exclusive in character, such as the right to apply to the Ombudsman, or to petition the European Parliament, which can be exercised by natural and legal persons resident in the Union.<sup>125</sup> Such an argument, which focuses on the civic connotations of ‘people’ as used in the present version of the EC Treaty, pre-empts rather effectively the possibility of relying upon the shift, in Article 10 TEU, from ‘people’ to ‘citizens’ as a significant change in terminology, since the non-exclusivity of these key participatory citizenship rights is maintained. The Advocate General doubted, in any event, whether the expression ‘peoples of the States brought together in the Community’ in Article 190(1) EC was intended to have a ‘precise legal meaning’.<sup>126</sup>

### *3. The ‘will’ of citizens*

Article I-1 of the Constitutional Treaty, which sought to ‘establish’ the refounded European Union under the Constitutional Treaty, purported in that context to reflect ‘the will of the citizens and the States of Europe to build a common future’. One of the most prominent dimensions of the transition from the Constitutional Treaty to the Treaty of Lisbon was the so-called ‘abandonment’ of the constitutional idea, formalised in the detailed mandate for reform rather than refoundation, agreed at the June 2007 European Council.<sup>127</sup> Unsurprisingly, the Madisonian ideal of constitutive self-government expressed in Article I-1 CT was excised from the more modest provisions of the Treaty of Lisbon as part of that ‘abandonment’. In that it joined other elements such as the reference to the primacy of Union law, the flag, the symbols and the motto.

The Treaty of Lisbon, not least in the manner in which it was negotiated via the detailed mandate negotiated under the German Presidency and the perfunctory IGC held under the Portuguese Presidency, not to mention the marked preference for parliamentary ratification insisted upon in every Member State apart from Ireland, seemed to offer the authoritative reassertion of the principle that the Member States are the ultimate masters of the Treaties. At the same time, those elites thought that by dropping the blatant state-like symbols they were appeasing some of the anxieties expressed in the 2005 Dutch and French referendums. The first Irish referendum vote seems, at least in part, to suggest that matters are not as simple as that. While this chapter has already reflected upon two different sources of constitutional change in the Union, namely Treaty amendments and judicial activism, the Irish referendum reminds us that there is still the issue of popular consent to be taken into consideration. It is clear that one strand of argument which objects, on democratic and participatory grounds rather than eurosceptic grounds, to the denial of referendums in other states played at least a minor theme in the Irish referendum campaign. Whatever the political elites of the European Union and at least some of its Member States might wish, it is clear that the question of the proper role of popular consent in relation to the further development of European integration is not an issue which is simply going to dissipate on the back of a set of assurances to

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<sup>125</sup> See Articles 227 and 228 TFEU.

<sup>126</sup> Opinion, [80].

<sup>127</sup> Presidency Conclusions, Council Document 11177/1/07, Rev 1, Concl 2, 20 July 2007.

national parliaments that Treaty amendments are a good thing.<sup>128</sup> It may be the case that the concerns that citizens have too little influence over the direction and content may gradually ebb away if and when European Parliament elections come to be perceived as significant moments of 'European' democracy (as opposed to being second-order national elections with ever lower participation rates as is generally the case at present), and it is ironic that had the Irish referendum not been controversially repeated with a different result, after assurances to the Irish government, the failure of the Treaty of Lisbon to enter into force would have retarded that very trend.

Overall, it is tempting to argue that the story of the Laeken Declaration, the Convention, the Constitutional Treaty, the reflection period, the negotiation and signature of the Treaty of Lisbon and now the laborious process whereby the Lisbon Treaty was eventually ratified, including grandstanding by the Czech President and interventions from two constitutional courts (German and Czech) show how the political elites which have most influence over the content of both EU treaties and the focus of EU policies have failed to break out of a vicious circle in which the more they think they are doing to increase the democratic legitimacy of the EU polity and its treaty basis, the more they are perceived within the confines of national politics as illegitimately meddling in the arena of national (popular and parliamentary) sovereignty.

This bleak assessment is upheld by opinion surveys on citizenship issues. A Eurobarometer survey published in February 2008<sup>129</sup> highlighted (continuing) widespread ignorance about the details of citizens' rights under EU law, especially in the new Member States, even though a substantial 78% of those questioned across the Member States did claim some familiarity with the term. In practice, they were often unable to identify correctly which rights attach specifically to Union citizens and/or did not know that they automatically were Union citizenship by virtue of their national citizenship. However, an earlier Eurobarometer survey published in May 2006 on the topic of the Future of Europe,<sup>130</sup> which contained some questions on citizenship, revealed an interesting trend. When respondents were asked what would be the best ways to strengthen European citizenship, rather large numbers of them *spontaneously* replied that they did not wish to be a European citizen. The figure stood at 8% across the EU as a whole, but was a daunting 25% in the United Kingdom. This suggests a modest approach remains necessary when discussing such matters, especially, but not solely in the UK. It also suggests that citizenship of the Union has—for most people—a Cinderella status. This point needs to be borne in mind as the analysis in this chapter proceeds. While it is often said that citizenship of the Union, in its current treaty form, is a vapid and impoverished version of the membership concept which has been central to liberal democratic and constitutionally based (national) polities, there does not seem to be any obvious popular legitimacy driving the argument that EU citizenship *should* be developed in more substantial ways than it is at present. It is to the specific challenge of the Union citizen as an actor in the context of structures for democratic participation that we therefore now turn to see whether there is anything in the Treaty of Lisbon that can overcome the doubts expressed here.

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<sup>128</sup> See J Habermas, 'The search for Europe's future', *Spiegel Online International*, 18 June 2008, <http://www.spiegel.de/international/europe/0,1518,560549,00.html>.

<sup>129</sup> Flash Eurobarometer 213.

<sup>130</sup> Special Eurobarometer 251.

#### 4. The democratic life of the Union

Where the Constitutional Treaty grandiosely referred to ‘the democratic life of the Union’, the TEU post-Lisbon contains merely a title on ‘democratic principles’, although the basic provisions are the same. This title fleshes out somewhat the notion of the citizen as a political actor within the EU, without fully embracing a concept of democratic citizenship. Speaking to the provisions of the Constitutional Treaty on democratic engagement, but with clear resonance for the Lisbon Treaty provisions also, Closa warned that:

‘The conception of citizenship that emanates from these provisions privileges a vision of citizens as bearers of rights that provide them protection from public authorities, grant them some reduced scope of participation in the policy process but, by and large, it does not establish a solid connection between the citizens and the exercise of their political rights and the “democratic life of the Union”’.<sup>131</sup>

The provisions on democracy, which could be criticised for lacking a central focus, address consecutively concepts of representative, direct and participatory democracy, without giving the impression of how these might be linked in a coherent way. The provision with the greatest capacity to capture headlines concerns citizens’ initiatives (Article 11(4) TEU), where an important link to citizenship of the Union is made through the location of the relevant legal basis. Article 24 TFEU, within the citizenship provisions, contains a legislative power, permitting the European Parliament and Council, acting by co-decision, to adopt the provisions necessary to implement the new ‘citizens’ initiatives’. The basic ‘constitutional’ principle, meanwhile, is to be found in Article 11(4) of the post-Lisbon TEU:

Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

This new opportunity for a European Citizens’ Initiative (ECI) to direct the input of a minimum of one million signatures into the legislative process is intended harness citizen power, especially via the internet, enabling it to be channelled towards seeking specific legislative initiatives to be put forward by the Commission. Citizens’ initiatives, well known in other national and—especially—subnational contexts,<sup>132</sup> were originally included in the Constitutional Treaty (allegedly at the behest of Giscard d’Estaing himself), and they were retained in the TEU provisions on ‘democratic principles’ (Article 11(4) TEU). Under the TFEU, the European Parliament and the Council must together define what constitutes a ‘significant number of Member States’, for the purposes of determining the minimum standard of cross-EU representativity for any citizens’ initiative which is to be taken up in legislative format. These initiatives could develop into interesting cases of *transnational* popular democratic pressure, without as such detracting from the powers of national parliaments. In a commentary on the Constitutional Treaty, Jean-Claude Piris described the ECI provision as ‘very innovative and symbolic’.<sup>133</sup> He notes that while ‘the Commission

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<sup>131</sup> C Closa, ‘Constitutional Prospects of European Citizenship and new forms of democracy’, in G Amato, H Bribosia and B de Witte (eds), *Genesis and destiny of the European Constitution*, Brussels: Bruylant, 2007, 1037-1063 at 1052.

<sup>132</sup> Eg Scotland and Swiss Cantons.

<sup>133</sup> J-C Piris, *The Constitution for Europe*, Cambridge: Cambridge University Press, 2006 at 119.

will not be legally obliged to follow up on any such initiative, the political weight of it will, in practice, force the Commission to engage in serious work following the result of an initiative.’

Ever since they were first mooted in the Convention on the Future of Europe, citizens’ initiatives have received quite substantial attention on the part of NGOs and think tanks specifically engaged with campaigning on the issue<sup>134</sup> as well as more general civil society organisations,<sup>135</sup> academics (especially those coming from traditions of direct democracy such as Switzerland<sup>136</sup>), and governmental bodies especially the European Commission and the European Parliament.<sup>137</sup> Informally, quite a number of such initiatives have been launched since the conclusion of the Constitutional Treaty, although largely on matters which are outside the competence of the Union as such or on matters which the Commission could simply not take up as legislative proposals such as the so-called ‘One Seat’ campaign to see the European Parliament located only in Brussels.<sup>138</sup> Such an initiative would have been declared inadmissibility under the proposed new system. Already, internet sites have sprung up offering the software capabilities for collecting the requisite number of signatures in a sufficiently secure and verifiable way,<sup>139</sup> under the aegis of the European Commission funded eParticipation preparatory action.<sup>140</sup> The Commission has been quick to act, bringing out a Green Paper on the ECI as soon as it was clear that the Treaty of Lisbon would come into force, and organising a public consultation process and public hearing on the matter.<sup>141</sup> At the end of March 2010, the Commission came forward with a proposal for a Parliament and Council Regulation on the citizens’ initiative,<sup>142</sup> with swift action expected from the political institutions under the guidance of the Spanish Presidency in the first half of 2010 and thereafter the Belgian Presidency to see this measure adopted.

In like manner, the European Parliament got involved at an early stage adopting a resolution requesting the Commission to come forward with a proposal for the necessary legislation to implement the ECI,<sup>143</sup> but expressing certain concerns about the conditions under this the ECI should be exercised. For example, the bar should not be set too high in respect of the minimum number of Member States from which the persons supporting the initiative must

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<sup>134</sup> See, for example, the Initiative for the European Citizens’ Initiative, <http://www.citizens-initiative.eu/>; Democracy International, <http://www.democracy-international.org/eci.html>; Initiative and Referendum Institute Europe, <http://www.iri-europe.org/>.

<sup>135</sup> See, for example, Permanent Forum for European Civil Society, <http://en.forum-civil-society.org/spip.php?rubrique37>.

<sup>136</sup> See for example A Auer, ‘European Citizens’ Initiative’, (2005) 1 *European Constitutional Law Review* 79-86; some papers written during the ‘constitutional interregnum’ after the rejection of the Constitutional Treaty and before the Treaty of Lisbon was brought forward addressed whether there are other means to bring the ECI into effect: M Elfer, *European Citizens’ Initiative. Legal options for implementation below the constitutional level*, December 2006.

<sup>137</sup> It has also attracted the attention of non-core public bodies such as the Assembly of European Regions, which debated the ECI on 12 February 2010: <http://www.aer.eu/news/2010/2010021201.html>.

<sup>138</sup> Details of the initiatives thus far can be found in C Berg *et al* (eds), *Initiative for Europe. Handbook 2008. The Guide to Transnational Democracy*, Marburg: Initiative and Referendum Institute Europe, 2007, [http://www.iri-europe.org/fileadmin/user\\_upload/media/IRI-Handbook2008.pdf](http://www.iri-europe.org/fileadmin/user_upload/media/IRI-Handbook2008.pdf).

<sup>139</sup> E.g. <http://www.europetition.eu/>.

<sup>140</sup> [http://ec.europa.eu/information\\_society/activities/egovernment/implementation/prep\\_action/index\\_en.htm](http://ec.europa.eu/information_society/activities/egovernment/implementation/prep_action/index_en.htm)

<sup>141</sup> See Commission Green Paper on a European Citizens’ Initiative, COM(2009) 622, 11 November 2009; for more on citizens’ initiatives see the Commission’s dedicated internet page at [http://ec.europa.eu/dgs/secretariat\\_general/citizens\\_initiative/index\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/index_en.htm).

<sup>142</sup> COM(2010) 119.

<sup>143</sup> European Parliament resolution of 7 May 2009 requesting the Commission to submit a proposal for a regulation of the European Parliament and of the Council on the implementation of the citizens’ initiative.



come. The Commission has initially proposed that it should be set at one third of Member States, along with a degressively proportional formula for determining the minimum number of expressions of support from each of these states in order for it to count towards the total. In smaller Member States, this would be a higher proportion of the population than in larger Member States.<sup>144</sup> There is to be a procedure for registering ECIs with the Commission,<sup>145</sup> and also—at a certain point during the course of the collection of expressions of support—a reference to the Commission regarding the admissibility of the ECI.<sup>146</sup> The Commission is required to state whether this is an initiative properly formulated within the framework of the Regulation—i.e. is it in a field where the Commission could, in accordance with the Treaties, properly come forward with a proposal for legislation. The organisation of ECIs is to be reserved to EU citizens alone, and only EU citizens can give statements of support which will count towards the million signatures.<sup>147</sup> Further work is to be done on ensuring that, in conjunction with the Member States, appropriately secure online systems can be used to collect statements of support, but the general task of verifying statements of support will fall on the Member States, and Member States must undertake verification without making a charge.<sup>148</sup> Clearly, therefore, there is a considerable ‘good administration’ challenge for both the Commission and the Member States in the management of what threatens to become a highly bureaucratized procedure.<sup>149</sup> Indeed, the greatest challenge posed by the Commission’s proposal (made truly evident only in Annex III to the draft Regulation which contains a draft ‘statement of support form’) is that signatories would be required to give some sort of personal identification number in order to ‘count’—the number of their ID card, their passport number, or their social security number. This seems likely to pose an insurmountable hurdle in most cases, and raises data protection issues, which the draft Regulation does not truly address. All of this seems extraordinarily burdensome for an initiative which does not bind the Commission even to propose legislation, much less the European Parliament or the Council of Ministers to adopt it.

A particular concern lies with the transparency of those organising the initiative, and the Parliament suggested that it should be a requirement that the proposers should produce a report stating where the sources of funding for organising the initiative and the collection of signatures had been drawn, which must be submitted before the Commission began to examine the issues raised by any successful initiative. This suggestion has been picked up by the Commission.<sup>150</sup> The fear is, of course, that citizens’ initiatives—whatever their inspiration—may be captured by the same interests, often of a corporate nature, which crowd around the legislative process within the EU already. Such initiatives could end up damaging the representative process itself, for example, by inflating minority views or compressing complex decisions into simple binary choices in favour or against the initiative.<sup>151</sup> Although citizens’ initiatives might foster dialogue which promotes democratic practices, if they result in no action, they might also disappoint expectations which have been fostered amongst those who have expressed support for any given initiative. To put it another way, how can it be

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<sup>144</sup> See Articles 2 and 7 of the draft Regulation, above n142.

<sup>145</sup> Article 4.

<sup>146</sup> Article 8.

<sup>147</sup> Article 3.

<sup>148</sup> Articles 6 and 9.

<sup>149</sup> See the contribution of the European Ombudsman to the consultation process on the ECI, <http://www.ombudsman.europa.eu/resources/otherdocument.faces/fr/4592/html.bookmark>, January 2010.

<sup>150</sup> Article 4(1).

<sup>151</sup> For a review of the arguments for and against citizens’ initiatives (in the context presented to the UK Parliament), see House of Commons Library Standard Note, *Citizens’ Initiatives*, SN/PC/04483, 1 May 2008.

ensured that citizens' initiative support and foster (better) representative democracy, rather than hollowing it out any further than it already is.

It is concerns such as these, not to mention the problem that are not, on any view, hardly a panacea for the evil of falling popular participation in elections, which lead to the view that the ECI is not a simple means by which the EU can find the elusive popular legitimacy and the 'closeness' to the citizen so often cited in official documents and elite rhetoric on the Union's institutional practices. The ECI will undoubtedly be established in formal terms, given the provisions of the TEU and the TFEU, the progress already made, and the level of momentum from the political institutions and organised civil society behind the idea. Its impact on the challenge of constructing an effective political citizenship both *of and in* the Union seems, at this stage, much less clear.

### **E. Citizenship's Future: integrative or constitutive?**

The objective of this chapter was, it should be recalled, not to plead for any specific model of citizenship, but rather to identify the conditions under which polity-building occurs and to highlight the diffuse and incremental changes which are occurring in the formal and informal arrangements which contribute to the construction of membership norms and membership practices. The chapter has thus attempted to explore the multiple dimensions of 'citizenship' as a membership status and set of practices, as it operates in the EU context. The conscious intention was to go beyond a focus on the legal institution of citizenship *of* the Union and to see how citizenship has contributed to wider constitutional debate by citizens *in* the EU context. It has identified a bifurcation between the integrationist and constitutionalist dimensions in citizenship hitherto. While Union citizenship, as a rather thin transnational concept, sits comfortably within the 'old' constitutional norms of the constitutionalised legal order based on the Treaties as interpreted by the Court of Justice, it has not yet emerged as the basis for effective and coherent political action in the context of the various processes of constitution-building (Charters, Conventions, Treaties and ratification processes) of the 2000s.<sup>152</sup> On the contrary, 'citizenship' has been invoked as frequently to contest as it has to confirm the legitimacy of the EU, in the form of rejectionist referendums in particular. In declaring that Citizenship of the Union is destined to be the fundamental status of the nationals of the Member States, the Court of Justice has made a bold claim. But inevitably, given the limitations of the treaties as they stand, the Court has not paid the same amount of attention to the construction of a defensible and legitimate concept of citizenship at the EU level as it has so far to hollowing out, sometimes at an alarming rate, national competences which constitute the baseline for membership rights at the national level (e.g. welfare issues) and even—most recently—engaging with the thorny question of national citizenship status definition (in the *Rottmann* case). Thus, in most respects, citizenship has undoubtedly had integrative rather than constitutive effects, despite the symbolic power of the membership concept. But this is a dangerous and unsustainable status quo, not least because it demands, as the Court has recognised itself, a 'certain degree of solidarity between the Member States'. And while the Treaty of Lisbon does slowly begin to invest more political content into the citizenship provisions, the challenge of simultaneously thinking about what kind of membership is appropriate for a polity emerging *beyond* but not *without* the state has yet to be taken up.

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<sup>152</sup> See D Castiglione, 'We the Citizens? Representation and Participation in EU Constitutional Politics', in R Bellamy, D Castiglione and J Shaw (eds), *Making European Citizens. Civic Inclusion in a Transnational Context*, Basingstoke, Palgrave Macmillan, 2006, 75-95.